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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 410

OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS OF THE WESTERN TOOL & MANUFACTURING CO., ET AL., PETITIONERS,

vs.

JAMES G. GURNEY, INDIVIDUALLY AND ON BEHALF OF OTHER SHAREHOLDERS OF THE WESTERN TOOL & MANUFACTURING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1944.

CERTIORARI GRANTED OCTOBER 23, 1944.

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CAPTION.

UNITED STATES OF AMERICA,

IN THE DISTRICT COURT OF THE UNITED STATES,
IN AND FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PETITION.

(Filed January 11, 1943.)

To the Honorable Judges of the District Court of the United States, for the Southern District of Ohio, Western Division:

Your petitioner, The Western Tool & Manufacturing Co., respectfully represents:

1. Petitioner is a corporation organized and existing under the laws of the State of Ohio and is a corporation which could become a bankrupt under the Acts of Congress relating to bankruptcy and is not a municipal, insurance or banking corporation or a building and loan association or a railroad corporation.

2. Your petitioner now has and for the last six months preceding the filing of this petition has had its principal office and place of business at Springfield, Ohio within the territorial jurisdiction of this Court.

3. The nature of the business of the petitioner is the ownership and operation of a factory for the manufacture of tools, which factory is located in Springfield, Ohio.

4. Petitioner was incorporated in the year 1904 under the name of the Western Manufacturing Company, which name was subsequently changed to The Western Tool & Manufacturing Co.

5. The assets of petitioner consist of land, buildings, machinery, equipment, inventory consisting of raw materials, goods in process and finished goods, cash on hand and notes and accounts receivable.

6. The current liabilities of petitioner consist of current accounts payable, including wages and salaries and current and accrued taxes. The current liabilities have been incurred from day to day in the operation of said plant, both prior to July 15, 1942 and subsequent to said date. Subsequent to July 15, 1942 the property and factory of your petitioner has been operated by William T. Kettering as receiver, appointed in the Court of Common Pleas of Clark County, Ohio, as more fully hereinafter set forth.

7. Petitioner is unable to pay its debts as they mature.

8. The property of petitioner is subject to a first Mortgage Deed of Trust securing bonds in the unpaid principal amount of Seventy-three Thousand Four Hundred ($73,400.00) Dollars which by their terms bear interest at eight per cent per annum; that the original principal amount of bonds secured by said first Mortgage Deed of Trust was Ninety Thousand ($90,000.00) Dollars and that interest on Ninety Thousand ($90,000.00) Dollars of said bonds was paid at the rate of eight (8) per cent per annum up to the first day of May 1923; upon Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars of said bonds at the rate of six and one-half (6½) per cent per annum from May 1, 1923 to May 1, 1924 and upon Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars of bonds at the rate of six (6) per cent per annum from May 1, 1924 to November 1, 1929; that thereafter your petitioner purchased Sixteen Thousand Six Hundred ($16,600.00) Dollars face value of said bonds and thereby the same were cancelled and that thereafter, on June 16, 1942, your petitioner paid to certain individuals acting as a Bondholders' Protective Committee and being the holders of bonds in the principal amount of Seventy-three Thousand Four Hundred ($73,400.00) Dollars, the sum of Sixteen Thousand ($16,000.00) Dollars to be applied upon the indebtedness evidenced by the bonds held by such Bondholders' Protective Committee; that the interest paid upon said bonds at the rate hereinbefore set forth, the same being less than the rate of interest in and by said bonds provided, was made pursuant to agreement between your petitioner and said Bondholders' Protective Committee and thereafter said Committee agreed to accept interest upon said bonds at the rate of four (4) per cent per annum.

The Mortgage Deed of Trust securing said bonds was dated November 1, 1921 and conveyed all the property of your petitioner, real and personal, except cash, notes and accounts receivable and inventories.

9. On July 9, 1942, Owen N. Price, as Trustee under said Mortgage Deed of Trust, filed in the Court of Common Pleas of Clark County, Ohio, his certain petition to foreclose the lien of said Mortgage Deed of Trust, which cause was designated as No. 36421; thereafter, on July 15, 1942, one William T. Kettering, a resident of the State of Illinois, was, in said cause, appointed receiver of all the property, assets and rights of your petitioner and the said William T. Kettering accepted such appointment and has since said date been in possession of all the assets of your petitioner and has been operating the factory and plant of your petitioner.

10. On December 8, 1942 there was entered in said cause a judgment and order of foreclosure, in which there was found to be due from your petitioner upon the aforesaid bonds the sum of One Hundred Thirty-four Thousand Six Hundred Ninety-eight and 21/100 ($134,698.21) Dollars, which indebtedness so found to be due included interest at the rate of eight (8) per cent per annum despite the agreement made between your petitioner and said Bondholders' Protective Committee that said principal indebtedness should bear interest at the rate of four (4) per cent per annum; that a motion has been made to vacate said judgment and order of foreclosure, which motion is now pending and undisposed of.

11. Petitioner has an authorized capital of Two Hundred Thousand ($200,000.00) Dollars, divided into two classes, viz: Fifty Thousand ($50,000.00) Dollars preferred stock and One Hundred Fifty Thousand ($150,000.00) Dollars common stock, each class consisting of shares of a par value of One Hundred ($100.00) Dollars per share; that there are issued and outstanding one thousand one hundred twenty and one-half (1120½) shares of common stock and no preferred stock.

12. The specific facts showing the need for relief under Chapter X of said Act are as follows:

The value of the assets of your petitioner is greatly in excess of the indebtedness, both principal and interest, due

to the holders of the indebtedness secured by the Mortgage Deed of Trust sought to be foreclosed as aforesaid, which excess value will be lost to petitioner's stockholders in the pending foreclosure action; your petitioner is presently engaged in the manufacture of war products; that although your petitioner was operating at a profit prior to such foreclosure action, your petitioner is in need of additional machinery and equipment and of more modern machinery and equipment to replace obsolete and obsolescent equipment to enable your petitioner to operate at greatly increased profits, the financing of which additional machinery and equipment your petitioner can obtain if the mortgage indebtedness is adjusted, and the Bondholders' Protective Committee will not consent to any adjustment or extension of the indebtedness evidenced by said first mortgage bonds.

13. Adequate relief cannot be obtained under the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy for the reasons, among others, that the principal indebtedness of petitioner is secured as aforesaid.

14. Petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

15. No other petition by or against petitioner is pending under Chapter X of this Act, nor is any other bankruptcy proceeding by or against petitioner now pending.

WHEREFORE petitioner prays:

A. That an order be entered approving this petition.

B. That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act and your petitioner may have such other and further relief as is necessary.

THE WESTERN TOOL & MANUFACTURING CO.
By JAMES G. GURNEY.

State of Illinois } ss
County of Cook }

James G. Gurney, being first duly sworn, on oath deposes and says that he is the owner of seven (7) shares of the One Hundred ($100.00) Dollar par value common stock of The Western Tool & Manufacturing Co., and

that he is the agent and attorney-in-fact and holds the proxy of Harlan T. Hyde, James Gurney (also known as James Gurney, Jr.) and Stella K. Gurney and as such agent and attorney-in-fact has full power and authority to do all things which the aforesaid principals might or could do in the protection and advancement of their interest as shareholders of said corporation.

Affiant further says that Stella K. Gurney is the owner and holder of sixty-six like shares of said corporation; that James Gurney (also known as James Gurney, Jr.,) is the owner and holder of fifty-nine (59) like shares of said corporation and that Harlan T. Hyde is the owner and holder of five hundred fifty and three-fourths (550¾) like shares of said corporation; that the duly issued and outstanding shares of said corporation are one thousand one hundred twenty and one-half (1120½) common shares.

Affiant further says that under date of November 1, 1923, one Charles S. Deneen, now deceased, W. T. Kettering, the present receiver of said corporation, W. D. Hollister, Enoch J. Price and Edward I. Bloom entered into an agreement with the holders of the outstanding first mortgage eight (8) per cent serial gold bonds described in the foregoing petition, wherein and whereby the aforenamed persons undertook to act and did thereafter act as a Committee for said bondholders and did thereafter, pursuant to the terms of said agreement, become vested with the legal title to all of said bonds and coupons; that bonds of the principal face amount of Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars was thereafter deposited by said bondholders; that Edward I. Bloom is no longer a member of said Committee but for more than three (3) years last past W. T. Kettering, W. D. Hollister, and Enoch J. Price have exercised all the powers and rights conferred by said agreement upon said Committee.

Affiant further says that under date of July 20, 1923 the aforesaid Charles S. Deneen, now deceased, W. T. Kettering, W. D. Hollister and Enoch J. Price, as members of such Committee, entered into a Voting Trust Agreement with James Gurney (also known as James Gurney, Jr.) and certain other parties, copy of which is attached hereto and designated as Exhibit A; that the said James Gurney (also known as James Gurney, Jr.) deposited with such said Voting Trustees the certificate or certificates repre-

senting the fifty-nine (59) shares of stock of said corporation by him owned and a Certificate of Beneficial Ownership was issued to him therefor; that on April 30, 1928 Harlan T. Hyde acquired a Certificate of Beneficial Ownership issued by the said Voting Trustees representing the deposit with them of four hundred forty-three and one-half (443½) shares of the capital stock of said corporation by Edward S. Thomas and a new certificate of Beneficial Ownership was issued to him therefor.

Affiant further says that since November 1, 1923, the said persons acting both as a Bondholders' Committee and as Voting Trustees, having on deposit with them six hundred forty (640) shares of the issued and outstanding shares of the capital stock of said corporation, have managed and controlled the affairs of said corporation; that prior to March 28, 1941 the Board of Directors of said corporation consisted of seven persons, viz: William J. Grimm, Erna H. Wheeler, one Rust, W. T. Kettering, Enoch J. Price, Harlan T. Hyde and affiant; that the By-laws of said corporation provided that Directors may be elected either at an annual meeting of stockholders to be held on the fourth Tuesday of January in each year or at a special meeting of stockholders called for that purpose, at which special meeting the holders of three-fifths (3/5) of the outstanding shares of the corporation shall be present in person or by proxy.

Affiant further says that on the 17th day of March 1941 a notice was sent at the direction of Enoch J. Price to Harlan T. Hyde of the holding of a purported annual meeting of stockholders, to be held on the 28th day of March 1941, and further stating: "Inasmuch as nothing of importance will be brought up at the meeting it will not be necessary for you to attend"; that at said time Harlan T. Hyde was residing in the state of Florida and in reliance upon said representations did not attend; that at said meeting held on March 28, 1941, there was represented in person and by proxy only six hundred forty-eight and one-half (648½) shares of the outstanding capital stock of said corporation, the same being less than three-fifths (3/5) thereof; that no notice whatsoever of the holding of said meeting was given to Stella K. Gurney; that at said meeting the number of Directors was reduced from seven (7) to five (5) and Harlan T. Hyde and the said

Rust were not elected to be Directors of said corporation; that such election of Directors was wholly void and invalid and immediately thereafter a purported Directors' meeting was held at which Enoch J. Price was elected President, W. T. Kettering was elected Vice President and Erna H. Wheeler was elected Secretary, Treasurer and Manager; that the said Erna H. Wheeler and William J. Grimm are salaried employees of the corporation and at all times subject to the direction and control and subservient to the wishes of Enoch J. Price and W. T. Kettering; that another purported annual meeting of stockholders of said corporation was held on the 27th day of March 1942, of which meeting no notice was given to Stella K. Gurney or Harlan T. Hyde and at which meeting there was represented in person and by proxy only six hundred fifty-eight and one-half (658½) shares of the capital stock of said corporation, being less than three-fifths (3/5) thereof; that at said purported meeting the same persons, the purported Directors, were purportedly re-elected Directors and the same persons were immediately thereafter purportedly re-elected as officers.

Affiant further says that the said corporation is without a *de jure* Board of Directors or *de jure* officers for the reasons aforesaid and that Enoch J. Price and W. T. Kettering, who are exercising the functions of those offices individually and by and through their tools Erna H. Wheeler and William J. Grimm are, in fact, and have for a number of years last past, occupied conflicting and inconsistent fiduciary positions in that as members of the Bondholders' Protective Committee they have fiduciary duties and obligations to the bondholders, as Voting Trustees they have fiduciary obligations and duties to the depositing stockholders and as Directors and officers they have fiduciary duties and obligations to all the stockholders depositing and non-depositing; that they have controlled the affairs and functions of the corporation since 1923 solely for the interest of the bondholders and to the disinterest of the stockholders in that they have utilized funds of the corporation to purchase and acquire Certificates of Deposit of first mortgage bonds of the face or par value of Sixteen Thousand Six Hundred ($16,600.00) Dollars, they have caused the corporation to pay to them as a Bondholders' Committee the sum of Sixteen Thousand ($16,000.00) Dol-

lars on June 16, 1942 and have not accounted therefor, they have caused funds of the corporation to be paid to themselves by way of salary, fees or otherwise and they have caused funds of the corporation to be paid to them as and for their expenses as the Bondholders' Committee.

Affiant further says that on or prior to July 20, 1923, the said Bondholders' Committee agreed with James Gurney, Jr., and other shareholders of said corporation, to cause a refunding of said bond issue at a rate of interest not exceeding four (4) per cent per annum; that they have failed to cause such refunding and have caused said corporation to pay to the said Bondholders' Committee interest in excess of that rate as set forth in the foregoing petition and in addition thereto have caused a judgment to be entered in the foreclosure proceedings set forth in said petition, which judgment included interest upon the said mortgage bonds at the rate of eight per cent (8%) per annum; that they have at all times refused to purchase or acquire, or permit said corporation to purchase or acquire more modern and efficient machinery or to adopt more efficient methods of production; that none of them is acquainted with modern methods of tool production and although repeatedly requested by affiant have refused to obtain the advice and counsel of a production engineer in order to enable the corporation to increase its production and lower its costs of operation; that such refusals were based upon the desire of said Bondholders' Committee to obtain all possible funds of the corporation for the benefit of the bondholders and not to permit any of the profits of said corporation to be reinvested for improvement in method or equipment.

Affiant further says that on June 15, 1942 Harlan T. Hyde and James Gurney (also known as James Gurney Jr.) demanded of the aforesaid Voting Trustees the return of the Certificates of stock theretofore deposited with them, which demand was refused; that the Voting Trust Agreement under which such certificates are retained by said Voting Trustees has by its terms terminated inasmuch as the bond issue therein mentioned was not refunded by said Committee and said Voting Trust Agreement is illegal and void under and by virtue of the laws of the state of Ohio and is of no force and effect as the same has expired.

Affiant further says that James Gurney (also known as James Gurney, Jr.), Stella K. Gurney, Harlan T. Hyde and this affiant did heretofore demand that said corporation file the foregoing petition, which demand was not complied with despite the fact that in said foreclosure proceedings said corporation wrongfully admitted all the allegations in the petition for foreclosure contained and permitted a judgment in said foreclosure proceedings to be entered without objection in an excessive amount and ordering the sale of properties and assets of the corporation upon which the lien of said Mortgage Deed of Trust had expired.

Affiant further says that the only way in which the excess value of the stockholders' interests in the assets of said corporation, over and above the indebtedness of said corporation, can be preserved is in and by this proceeding.

Affiant further says that neither he nor any of his principals have been given a balance sheet or statement of profit and loss of said corporation but that the same is within the sole knowledge of the persons purporting to act as Directors and officers thereof, being the persons who refused to comply with the demand to institute this proceeding, and that therefore affiant cannot attach hereto a balance sheet, statements of assets and liabilities nor an operating statement of said corporation.

Further affiant sayeth not.

JAMES G. GURNEY.

Subscribed and sworn to before me this 9th day of January, A. D. 1943.

Hattie Niemann,
Notary Public.

(Seal)

My commission expires 3/10/44.

EXHIBIT A

Voting Trust Agreement

The Western Tool and Manufacturing Co.

This agreement entered into as of the 20th day of July, 1923, between Henry Morris, James Gurney, Jr., and Edw. Thomas of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister, and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of the Western Tool and Manufacturing Co., and said parties of the second part are members of a bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present, provided it is enabled to control the policy of said company pending the payment of such refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said—The Western Tool and Manufacturing Co., as follows:

Henry Morris—shares	87.50
Edward S. Thomas—shares	443.50
James Gurney, Jr.—shares	59.
	590.00 Total

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payments in full of the refunding bond issue to be arranged for by said committee with full exclusive right to vote the same at all stockholder's meetings of said corporation, while so held, as such Trustees or a majority of them shall determine. Said Trustees or

any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of the said shares, respectively, or to their assigns or legal representatives; said trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively, may be sold or assigned, and if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bond holder's committee shall fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case one or more of said second parties should resign, die or refuse to act, the remaining members shall have full power in all respects to act for all in voting said stock and redelivering it to the proper parties.

Witness our hands and seals this day and year above witness.

ORDER.

(Filed January 12, 1943.)

This matter came on to be heard upon the Petition of The Western Tool & Manufacturing Co., filed by James G. Gurney, Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., and Stella Gurney, praying this Court to take jurisdiction of this cause under Chapter X of the Bankruptcy Act, and to approve the Petition as filed in good faith; the Court, being fully advised in the premises,

finds that the within Petition was properly filed under Chapter X of the Bankruptcy Act and the said Petition is hereby approved as having been filed in good faith.

It is therefore ordered and decreed that Owen N. Price, as Trustee for the bondholders, William T. Kettering, as Receiver, Erna H. Wheeler, all creditors, lienholders, pledgees and escrowees of The Western Tool & Manufacturing Co., their agents, alteregoes, attorneys, nominees, trustees and/or assigns, and all other persons, including sheriffs, marshals, and other officers and their deputies, are hereby enjoined and restrained, without notice, from seizing or attempting to seize, the assets or from disturbing the present possession of William T. Kettering, as Receiver, of said assets and property of The Western Tool & Manufacturing Co., or instituting, or further prosecuting any actions or suits at law or in equity in any court of the United States, or any state thereof, against said The Western Tool & Manufacturing Co., or its assets, or before any commission or other administrative bodies or boards, or from hypothecating or attempting to hypothecate, or sequester, any of the property or assets of said The Western Tool & Manufacturing Co., or in which said The Western Tool & Manufacturing Co., may have any right, title, or interest, or from selling or attempting to sell any of the assets or property, except the manufactured product, of The Western Tool & Manufacturing Co., in their possession as Receiver, escrowees or otherwise, or from removing the same, or permitting the same to be removed from the place where same is now situated, and all other persons including creditors, lienholders, pledgees, escrowees, their agents, alteregoes, attorneys, nominees, trustees and/or assigns, and all other persons, including sheriffs, marshals and other officers and their deputies hereby are enjoined and restrained from in any way interfering with the orderly business of The Western Tool & Manufacturing Co., or in the orderly administration of said estate by William T. Kettering, as Receiver, and from in any way committing or attempting to commit any action whatsoever which may result in temporary disruption or interference with the orderly operation of said property and business.

It is further ordered that the Clerk of this Court send a copy of this order to The Securities Exchange Commis-

sion, that the said Owen N. Price, as Trustee, William T. Kettering, as Receiver and Erna H. Wheeler, personally appear within ten days after the service of the writ, to answer to the Petition filed by The Western Tool & Manufacturing Co., by James G. Gurney, Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., and Stella Gurney.

This cause is continued for further hearing until Friday, February 19th, 1943, at 10:30 A. M.

Approved:

NEVIN,
Judge.

CHARLES W. STIEFEL.
GEO. R. MURRAY

MOTION OF THE BONDHOLDERS' PROTECTIVE COMMITTEE.

(Filed February 5, 1943.)

Now come Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering and say they are a duly constituted Committee under a Bondholders' Protective Agreement of November 1, 1923, under which holders of bonds issued by The Western Tool & Manufacturing Co., dated November 1, 1921, secured by Mortgage Deed of Trust of November 1, 1921, executed by said Company and recorded in Volume 133, page 17, et seq., of Mortgage Records of Clark County, Ohio, deposited their said bonds in accordance with said Agreement and thereby assigned and transferred said bonds and the coupons attached thereto to said Committee so that this Committee thereupon became the owner and holder of such bonds with full power and right to enforce and collect the same.

That $73,100.00 of said bonds are now so held by this Committee (and have been so held for more than fifteen years,) comprising all of the outstanding bonds issued by said Company and secured by said Mortgage Deed of Trust, except $300.00 of said bonds owned by persons un-

known to the Committee, to said Company and to the Trustee under said Mortgage Deed of Trust, which have neither been so deposited and transferred nor presented for payment of interest or otherwise heard of for more than twenty years; and upon a plea by said Company, in the hereinafter mentioned proceedings have been declared barred by the statute of limitations.

That pursuant to the provisions of said Bondholders' Protective Agreement the depositary of said Committee has duly issued and delivered to each of said depositing bondholders, a certificate to the effect that such bondholder has deposited his or her bonds in accordance with the terms of said Agreement, a true copy of which is filed herewith.

That on request and by direction of said Committee the present indenture Trustee under said mortgage Deed of Trust has reduced to judgment the debt due said bondholders in the case of *Owen N. Price, Trustee* v. *The Western Tool and Manufacturing Company*, No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942 in the sum of $134,698.21, to bear interest from that date at eight per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942 by the Receiver appointed therein, in accordance with the order of said Common Pleas Court.

This Bondholders' Protective Committee now moves the Court to dismiss the Petition herein for the following reasons, to wit:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by one secured creditor, to-wit: This Bondholders' Protective Committee.

Third: The petition herein was not filed in good faith, but was filed by said James G. Gurney, the owner of only three shares of stock, without authority or legal right in pursuance of his attempt to dictate the policy and management of said corporation for his own personal advantage and to delay or defeat the corporation's effort to pay its bonded indebtedness.

This Motion is to be supported by affidavits or by oral testimony, if so directed by the Court.

W. D. Hollister,
Wm. T. Kettering,
Roy Massena,
Enoch J. Price, *Secretary*,
Bondholders' Protective Committee.

Keifer & Keifer,
Keifer & Keifer
(Springfield, Ohio)
Attorneys.

APPLICATION OF THE WESTERN TOOL & MANUFACTURING CO.

(Filed February 5, 1943.)

The Western Tool & Manufacturing Co., by its President and Secretary, represents to the Court that said Company has not authorized the filing of the Petition in this proceeding and that the same was filed without the authority, acquiescence or knowledge of any of the officers of the Company or any of the directors other than James G. Gurney.

This corporation has no general creditors and had none at the time of the appointment of the Receiver by the Court of Common Pleas of Clark County, Ohio, and the only creditors are the bondholders secured by Mortgage Deed of Trust upon all the property of the Company and income taxes due to the United States and taxes due the State of Ohio, which are also preferred claims. The debt

due to said bondholders has been reduced to judgment in the case of *Owen N. Price, Trustee,* v. *The Western Tool & Manufacturing Company,* No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942, in the sum of $134,698.21, to bear interest from that date at 8 per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942. The current wages accruing to employes at the time of the appointment of said Receiver, (not then due), were fully paid by said Receiver under the order of said Court of Common Pleas.

This Company does not consent to the jurisdiction of the Court over it in this proceeding nor does it join in, consent or desire that this proceeding be maintained or that any reorganization thereof be had.

Wherefore, this Company asks for the proper order and direction of the Court.

THE WESTERN TOOL & MANUFACTURING CO.,
By ENOCH J. PRICE,
President.

ERNA H. WHEELER,
Secretary.

W. H. GRIFFITH
Attorney
Springfield, Ohio.

State of Illinois, } ss.
County of Cook, }

Enoch J. Price, being first duly sworn, says that he is the President and a director of The Western Tool & Manufacturing Co. of Springfield, Ohio, a corporation, and that the statements in the foregoing Application of said Company are true, as he verily believes.

ENOCH J. PRICE.

Sworn to and subscribed before me this 28th day of January, 1943.

RUTH C. NETTLAND,
Notary Public.

(Seal)

State of Ohio,)
County of Clark,) ss.

Erna H. Wheeler, being first duly sworn, says that she is the Secretary, Treasurer, General Manager and a director of The Western Tool & Manufacturing Co. of Springfield, Ohio, a corporation, and that the statements in the foregoing Application of said Company are true, as she verily believes.

ERNA H. WHEELER.

Sworn to and subscribed before me this 30th day of January, 1943.

EVA M. HAUCK,
Notary Public.

Eva M. Hauck
Notary Public, Clark County, Ohio
(Seal) My Commission Expires Jan. 14, 1944

NARRATIVE STATEMENT OF TESTIMONY OF WITNESSES HEARD FEBRUARY 19, 1943 BEFORE THE HONORABLE ROBERT R. NEVIN, DISTRICT JUDGE, AT DAYTON, OHIO.

(Filed September 3, 1943)

OWEN N. PRICE, called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as an adverse party, having been first duly sworn, testified as follows:

Direct Examination.

"My name is Owen N. Price. I live at 2124 West 112th Street, Chicago, Illinois. I am an attorney-at-law at the Bar of the City of Chicago, State of Illinois.

I am a son of Enoch J. Price, President of The Western Tool & Manufacturing Company. I am also the Trus-

tee under the first mortgage trust instrument. I instituted the foreclosure proceeding in the Court of Common Pleas of Clark County, Ohio against The Western Tool & Manufacturing Company in my capacity as Trustee."

Stipulation of counsel that Petitioner's exhibit 1 is a true and correct copy of the Petition filed by Owen N. Price, as Trustee under the first mortgage deed of trust of The Western Tool & Manufacturing Company on July 9, 1942, seeking a foreclosure of such mortgage deed of trust; that Petitioner's exhibit 2 is a true and correct copy of the answer of The Western Tool & Manufacturing Company in such foreclosure proceedings which answer states "Defendant admits the truth of all the allegations of the Petition and consents to the appointment of a Receiver;" that Petitioner's exhibit 3 is a true and correct copy of an amendment to the answer of The Western Tool & Manufacturing Company setting up that with respect to bonds in the total sum of $300.00 the Statute of Limitations has run against the same; that Petitioner's exhibit 4 is a true and correct copy of the Entry of Judgment and Order of Foreclosure in the foreclosure proceedings in the case of Owen N. Price as Trustee *vs.* The Western Tool & Manufacturing Company in the Court of Common Pleas of Clark County, Ohio, designated as No. 36421 rendered December 8, 1942.

The Court: "They may be admitted in evidence according to the exhibit number given them and made a part of this record."

The Witness: "The motion of Owen N. Price as trustee for bondholders filed in the proceeding on February 5, 1943 bears my signature."

The Court: "A copy thereof may be admitted in evidence as Petitioner's exhibit 5."

The Witness: "I am familiar with the signature of my father. Petitioner's exhibit 6, for identification, being a letter bearing date of May 22, 1941 bears my father's signature and Petitioner's exhibit 8, for identification, being a letter in longhand dated August 28, 1941 is in my father's handwriting and bears his signature; Petitioner's exhibit 9, for identification, being a Certificate of Beneficial Ownership of common stock of The Western Tool & Manufacturing Company dated October 18, 1923 bears my

father's signature: Petitioner's exhibit 10, for identification, being a Certificate of Beneficial Ownership of the common stock of The Western Tool & Manufacturing Company bears my father's signature in three places.

The judgment rendered by the Judgment Order, Petitioner's exhibit 4, was in the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight Dollars and twenty one cents ($134,698.21).

I know how that sum was arrived at. The factors which were considered were the unpaid interest on the bonds at the rate of 8% per annum from November 1, 1929 and principal amount of bonds of Seventy Three Thousand One Hundred Dollars ($73,100.00). Also considered was the application of Sixteen Thousand Dollars ($16,000.00) on the accrued interest as of June 16, 1942. Sixteen Thousand Dollars ($16,000.00) was paid by The Western Tool & Manufacturing Company a few days before the filing of that suit by me. I don't know to whom that Sixteen Thousand Dollars ($16,000.00) was paid; it went into the hands of the Bondholders Committee.

Sixteen Thousand Dollars ($16,000.00) was applied upon the mortgage indebtedness by accruing the interest to the date of payment, applying the Sixteen Thousand Dollars ($16,000.00) in reduction of the interest to that date. I am a little bit uncertain just how I worked that out. The full amount of the Sixteen Thousand Dollars ($16,000.00) was credited against interest which had been computed at 8% per annum. Paragraph 7 of Page 7 of Petitioner's exhibit 1 being the Petition filed by me to foreclose the mortgage states that interest had been paid by the corporation upon Ninety Thousand Dollars ($90,000.00) of bonds up to May 1, 1923 at the rate of 8% per annum; upon Eighty Nine Thousand Seven Hundred Dollars ($89,700.00) of said bonds at the rate of 6½% per annum from May 1, 1923 to May 1, 1924 and upon Eighty Nine Thousand Seven Hundred Dollars ($89,700.00) of said bonds at the rate of 6% per annum from May 1, 1924 to November 1, 1929. It was my information that the Bondholders Committee had accepted interest for those bonds at those rates; nevertheless, I had the foreclosure judgment compute interest at 8% per annum from November 1, 1929.

The Receiver, under the order of the Court of Common Pleas, paid me Seven Thousand Three Hundred Ten Dol-

lars ($7,310.00) on December 23, 1942 to apply upon the judgment in the foreclosure proceeding; that judgment does not include any fees to me as trustee nor attorneys fees. The Receiver, by order of court, in the foreclosure proceedings paid me Six Hundred Dollars ($600.00). Both trustee's fees to me and attorneys fees were allowed by order of court in addition to the judgment for One Hundred Thirty Four Thousand Six Hundred Ninety Eight Dollars and twenty one cents ($134,698.21).

The amount of that judgment does not include allowances to counsel, to receiver, or the trustee. It is the principal of bonds plus accrued interest to the date of judgment giving effect to all of the payments made. There was paid to my attorney Three Thousand Dollars ($3,000.00) in the foreclosure proceedings. The foreclosure proceeding has never been completed but a judgment has been entered; the property was not sold under the judgment; the Six Hundred Dollars ($600.00) to me and Three Thousand Dollars ($3,000.00) to my attorney were paid by the Receiver from the funds in the estate of The Western Tool & Manufacturing Company. The Receiver was Mr. William T. Kettering, who was also a member of the Bondholders Committee and a director of the corporation and a stockholder of the corporation. I cannot answer the question as to whether the Bondholders Committeee had agreed with the corporation to reduce the interest to 4% per annum.

I am not a member of the Bondholders Committee. I was a trustee prior to the foreclosure action. Petitioner's exhibit 7, for identification, appears to bear my father's signature. I discussed with my father the preparation of petition for foreclosure. I did not prepare the petition. He did not apprise me of any agreement with respect to the rate of interest being reduced to 4%. I knew that the Bondholders Committee had accepted 6% on various occasions in payment of interest for particular interest periods."

The Court: "Petitioner's exhibits 6, 7, 8, 9, and 10 may be admitted subject to any corrections of errors or any objections."

The Witness: "I understand that Mr. Gurney, on behalf of the stockholders of the corporation, retained Mr. Cole of Cole & Hodge of Springfield, as his attorney in

the foreclosure action. I do not know whether that counsel appeared in the case within a few days after the institution of the foreclosure."

Mr. Stiefel: "Is it admitted, Mr. Keifer, that Mr. Cole appeared in the proceedings as early as July 22, within two weeks after the proceeding was filed?"

Mr. Keifer: "I suppose that is true. Yes, I think that is true; I don't remember the date."

The Witness: "The last meeting I had with you, Mr. Stiefel, with respect to The Western Tool & Manufacturing Company was July 10, the day after the foreclosure proceeding was filed and at that meeting I informed you that a foreclosure proceeding had been filed the preceding day."

Cross Examination by Mr. Keifer.

"In my interview with Mr. Stiefel on July 10, the day following the day of the filing of the foreclosure petition, I advised him I had been informed by you (Mr. Keifer) that the Petition had been filed on July 9 and handed him a copy of the Petition, which he read. He asked me what the $16,000.00 item was that was recited as paid on account of the mortgage debt and wanted to know when it had been paid; he expressed the opinion that the stockholders would intervene in the case and would require the return of that money. Mr. Gurney was also present at that interview and heard this conversation. I became Trustee in the year 1935. Before that time The First National Bank of Springfield and Earl K. Stitt were Trustees. Mr. Stitt died in the year 1940 and the Bank had resigned as Trustee in connection with some bank merger.

In computing the amount of the judgment in the foreclosure case there was an error in calculation. As I recall, one or two years interest at 8% on part of the bonds were omitted. The due date of some of the bonds was in 1930 and some in 1931. The interest which had been paid was up to the year 1929, so there were certain coupons paid. In calculating the interest in those two years there was a mistake; I haven't the details of it. It amounted to something around $900.00. If computed according to the allegations of the Petition $900.00 would have been added to the amount of the judgment.

Re-direct Examination.

With the exception of this error, interest was computed from November of 1929 to the date of the Entry of the Judgment. I am simply confessing that there was an arithmetical error. If I had the figures of the due dates of the bonds before me I would be able to show where it is.

Certain bonds were due in November, 1929; there were attached to those bonds interest coupons. There were coupon No. 17 which was attached to bonds which fell due on May 1, 1930 and there were $11,500.00 of bonds maturing November 1, 1930 and $7,000.00 of bonds maturing November 1, 1931. The interest on those coupons amounted to $717.80. There was interest on coupon No. 18 which fell due on November 1, 1930, on the same bonds, amounting to $880.20. There was interest on coupon No. 19 falling due May 1, 1931 on $7,000.00 of bonds maturing November 1, 1931, amounting to $249.20. The interest due on coupon No. 20 on the same bonds amounted to $238.00. The coupons which matured May 1, 1930 amounted to $730.00; the coupons which were due on November 1, 1930 amounted to $740.00; they were on the same bonds. The coupon due May 1, 1931 amounted to $280.00 and those due November, 1931 amounted to $280.00. All those items were included in the judgment. What was not included in the judgment was the interest on $18,500.00 in bonds subsequent to the date the last coupon fell due. The last coupon on $11,500. of the bonds fell due on November 1, 1930; on $7,000.00 of the bonds it fell due November 1, 1931.

Part of that, the interest on $11,500.00 from November 1, 1929 to November 1, 1931 was not included. That interest was not represented by coupons. Those bonds matured in 1929 and 1930. I am mistaken. It was interest for one year on part and two years on the rest. Interest on bonds maturing in 1930 were evidenced by coupons for 1929 and for that part of the year in 1930. I also included in this judgment interest on certain interest coupons between 1929 and 1931. Interest was figured after the maturity of the coupons. I did not include interest in 1929 on coupons which did not mature until 1930 and 1931. I computed interest on the interest coupons at the rate of 8%.

MRS. ERNA WHEELER called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as General Manager and Agent of The Western Tool & Manufacturing Company, having been first duly sworn testified as follows:

Direct Examination.

My name is Erna Wheeler. I live at 1011 Woodlawn Avenue, Springfield, Ohio. I am in the employ of The Western Tool & Manufacturing Company and have been in its employ for 36 years last January. I am Secretary, Treasurer and Manager. I have been Secretary about 25 years and Treasurer and Manager along with the position of Secretary since July, 1931. I have been the actual operating head of that company since July of 1931. Since July 1931 I was getting $30.00 a week and in 1935 or 1936 I was raised to $35.00 per week, and a year ago I was raised to $40.00 per week. The President of that company, Mr. Price, lived in Chicago and the Vice President, Mr. Kettering, lived near Chicago in Lemont. I have been a Director of that company for 22 years. I was Secretary of the company in 1941 and 1942. Petitioner's exhibits 11, 12, 13 and 14, being letters addressed to Mr. Harlan T. Hyde, all bear my signature and were sent by me to Mr. Hyde. Petitioner's exhibit 15 is a copy of the original demand upon The Western Tool & Manufacturing Company for the filing of a Chapter X proceeding, which was served upon me and which was executed by Mr. Harlan T. Hyde, James Gurney, Stella Gurney and James Gurney by James Gurney, Jr. When I got it I immediately saw our attorney.

I don't know whether the corporation filed a Chapter X proceeding."

The Court: "Petitioner's exhibits 11, 12, 13, 14 and 15 may be admitted subject to any correction or objection Mr. Keifer may have to offer later."

Mr. Keifer: "We don't want any questions of Mrs. Wheeler now. I understand there are limits because of what he has gone into. We will ask her other questions later."

MR. WILLIAM T. KETTERING, called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as an adverse party, having been first duly sworn testified as follows:

Direct Examination.

"My name is William T. Kettering. I live in Oak Park, Illinois. I was born in the State of Illinois and have been a resident there up to now. I am still a resident of the State of Illinois although I have been spending all of my time in Springfield since the middle of July, since I was appointed Receiver in the foreclosure suit. I was Vice President of The Western Tool & Manufacturing Company and am now Receiver. That corporation is still in existence. I have been a director of that company for possibly 15 years. I am also a member of the Bondholders Committee and have been a member since it was organized in 1923. Petitioner's exhibits 16 and 17, for identification, are the Voting Trust Agreement of the stock.

There are 640 shares of stock deposited with Mr. Charles S. Deneen, Mr. W. D. Hollister, Mr. E. J. Price and myself as Voting Trustees. So far as my recollection goes, 443½ shares were deposited by Edward S. Thomas and 59 shares by James Gurney, Jr.

Mr. Deneen is dead; Mr. Hollister is still active. He lives in Denver, Colorado and has lived there for 4 or 5 years. He has not been a Director of the company for 4 or 5 years. Mr. Price and I, as the Voting Trustees, have voted this stock at the Stockholders' meetings for the Directors of the company. 640 shares constitutes a majority of the outstanding capital stock of the company."

The Court: Petitioner's exhibits 16 and 17 offered and admitted in evidence and made a part hereof.

The Witness: "The members of the Bondholders' Committee are Mr. Hollister, Mr. Massena, Mr. E. J. Price, Mr. Bloom and myself. Mr. Deneen has passed on. It is pretty hard to answer whether Mr. Bloom is still a member of the committee; he has not been at any of our meetings for a number of years. I haven't seen him for 6 or 7 years.

I can't answer when he last attended a meeting. Mr. Hollister is the same Mr. Hollister who is one of the Voting

Trustees. Mr. Enoch J. Price is the same Enoch J. Price who is one of the Voting Trustees. I am a member of the Bondholders' Committee and also a Voting Trustee. Mr. Massena replaced Mr. Deneen a few months ago; prior to that time his place was vacant. I own 20 shares of the stock of The Western Tool & Manufacturing Company in my own right. I bought it from Mrs. Salm while I was a Voting Trustee and on the Bondholders' Committee. I do not own any of the bonds of the company but my family does. I never owned any of the bonds of the company.

Members of my family have been bondholders since the bonds were issued. The principal of bonds on deposit with the Committee is $73,100.00. I presume they were deposited in 1923, that is the start of the Committee. The Committee was formed under the terms of a Protective Agreement dated November 1, 1923, which is marked as Petitioner's exhibit 18 for identification. Those bonds on deposit with the Committee have never been refunded."

Stipulation of Counsel that Petitioner's exhibit 19 for identification, is a Balance Sheet and that Petitioner's exhibit 20, for identification is a Profit and Loss Statement prepared by the Accountant employed at the instance of the Receiver, the Bondholders Committee and Mr. Price, Trustee, to examine the books and prepare such statements of The Western Tool & Manufacturing Company, and that Petitioner's exhibit 21, for identification, is a true and correct copy of an Inventory and Appraisement prepared by the appraisers appointed by the Court in the foreclosure proceeding against The Western Tool & Manufacturing Company.

The Witness: "Petitioner's exhibit 19, being the Balance Sheet of The Western Tool & Manufacturing Company shows a value of $5,000.00 for the land and $29,476.86 for the buildings, or a total of $34,476.86 for the land and buildings. After I became receiver I caused an appraisal of the land and buildings to be made; the total value as fixed by the appraisers was $37,585.00. Petitioner's exhibit 19 discloses the value of the machinery to be $10,527.71. I also had an appraisal made of the machinery in the foreclosure proceedings and the appraised value of the machinery was $15,402.72, but that includes equipment. There might have been a difference. We have fixtures, jigs, pulleys,

belting, separate, you see. About $2,700.00 on Petitioner's exhibit 19 is for dies, jigs, belting and pulleys; that would make a total close to $14,000.00."

Stipulation of Counsel that certain minute books marked as Petitioner's exhibits 22 and 23, for identification, are the minute books of The Western Tool & Manufacturing Company.

Mr. Stiefel: "At this time I want to offer Petitioner's exhibits 18, 19, 20 and 21."

The Court: "They may be admitted subject to correction of errors, if any there are."

Mr. Stiefel: "It has been stipulated by Mr. Keifer that these are correct copies."

Stipulation of Counsel that By-Laws contained in Petitioner's exhibits 22 and 23 are the true and correct By-Laws of the Debtor.

The Witness: "I was present at the annual meeting of Stockholders held March 28, 1941, minutes of which are set forth on page 141 of Petitioner's exhibit 23 for identification. I was present at the annual meeting of Directors held March 28, 1941, the minutes of which meeting appear on page 142 of Petitioner's exhibit 23 for identification. Those minutes correctly set forth what took place at those meetings. I was present at the annual meeting of Stockholders held March 27, 1942, the minutes of which meeting appear on page 146 of Petitioner's exhibit 23 for identification. Those minutes correctly set forth what took place at that meeting. I was present at the annual meeting of Directors held March 27, 1942, the minutes of which meeting appear on page 147 of Petitioner's exhibit 23 for identification, and those minutes correctly set forth what took place at that meeting.

Stipulation of Counsel that Article 1 of the Constitution and By-Laws as it appears on page 5 of the Petitioner's exhibit 22 and the minutes of the meetings appearing on pages 141, 142, 146 and 147 of Petitioner's exhibit 23, for identification, be copied in the record by the Court Reporter.

The Witness: "$16,000.00 was paid by the company to the Bondholders Committee immediately preceding the filing of the foreclosure suit and was credited to the mortgage and the interest. The money was turned over to the Bondholders' Committee, and from there to the Trustee

or the Bondholders' Committee, I have forgotten which, I presume the Bondholders' Committee made payment to the Bondholders; whether all of it was paid at that time I just don't remember; those matters are handled by Mr. E. J. Price.

I can't answer whether the payment was applied to interest or principal. It was interest on interest, I believe, only, the record would show. In addition, there was $7,310.00 paid by me as Receiver on December 23 to apply on interest.

I can't explain why Petitioner's exhibit 20 shows that interest in the amount of $7,640.00 was paid and charged against profits of the company. Interest on Company Bonded Indebtedness was $5,472.00; on Judgment Liability, $666.98; Interest and Discount $1,494.00, making $7,640.00. I can't answer what Interest and Discount represents. I was Receiver from July to December but I can't explain the figures exactly; there is a little difference. Of course, the Accountant could explain. I don't know what date the order of Court was entered in the foreclosure proceedings authorizing me to pay $7,310.00. Mr. Keifer will have to give you that."

Mr. Keifer: "The Order was entered December 22; the payment I believe was December 23".

The Witness: "Petitioner's exhibit 20 is a Profit and Loss Statement of The Western Tool & Manufacturing Company for the year ending December 31, 1942 and shows that only $6,000.00 was paid as interest on the bonded indebtedness. I did pay $7,310.00. It is probably in the $7,640.95, which includes interest on bonded indebtedness and interest on judgment liability.

Those two items don't total $7,310.00; but with interest and discount is $1,494.00. I don't know if interest and discount means discount on sales taken by my customers. Now it comes to me that there was a certain percentage paid on principal, not interest. The two items on Petitioner's exhibit 20 for identification, which set forth the interest paid on Company Bonded Indebtedness and Judgment Liability, total $6,100.00 approximately. The item of $4,400.00 for legal fees appearing on Petitioner's exhibit 20, represents the payments Judge Davis gave us an order to pay out. That was legal fees, Trustee's fees and Receiver's fees. I got part of that and included that as a

charge against the company's profit as well as the legal fees and Trustee's fees in the foreclosure action.

I cannot explain where in the Profit & Loss statement, Petitioner's exhibit 70, the $16,000.00 paid out to the Bondholders' Committee appears. There isn't any $16,000.00 in it. Our auditor could tell that. As shown by Petitioner's exhibit 20, after charging against income for the year 1942 $4,400.00 in foreclosure fees and expenses and Interest payments of $6,100.00, the corporation had a profit before taxes for that year of $78,615.00. At the present time I have on hand as Receiver $20,000.00 worth of Tax Anticipation Warrants and a week ago I had about $51,000 or $52,000 in cash. Our Accounts Receivable were about $12,000.00. I can't tell you the value of the inventory a week ago but it was about the same as December 31, 1942.

Between December 31, 1942 and today my cash has increased approximately $6,000.00 over the amount I then had on hand, as disclosed by Petitioner's exhibit 19, and Receivables have increased about $1,000.00. Our Accounts Payable are not more than $500.00, which is less than they were on December 31, 1942. I have shown a profit between December 31, 1942 and today of approximately $7,000.00.

During my course as Trustee, for a number of years I received no fees from the company. Then I made arrangements with the company to represent them in Chicago on a commission basis. After that I was called down to the plant a great many times, and so they paid me $8.00 a day and my expenses for just coming down. Sometimes I would be there once in two months, or once in a month, two days sometimes, and sometimes 6 or 8 days in a month. I received a 10% commission on all sales made by me. We also got a Director's fee. There never was a $1,000.00 paid to the Bondholders Committee for expenses."

Mr. Keifer: "We agree it was authorized by the Directors but it was not paid."

The Witness: "During the period since 1923 I have been in another business as well. I am not actively in it now. I quit the position since I have been Receiver. I was Vice President of Friedly-Voshardt Company. That company is still in existence. I did not resign; I just went off the payroll completely. I am still Vice President of that company and a stockholder. I cannot approximate

the number of Bondholders there are with The Western Tool & Manufacturing Company. I have not a list of them; our Committee has a list; Mr. Price has it."

Mr. Stiefel: "Have you the list here? I am not interested in the names of the Bondholders at the present time. All I want to know is the number of them."

Mr. Price: "I should say offhand fifty-six."

Mr. Stiefel: "Have you a list of them?" (After conferring with Mr. W. W. Keifer): "Mr. Keifer volunteers, upon information given him by Mr. Price, that there are approximately fifty Bondholders."

Mr. Keifer: "We have no questions at this stage."

MR. JAMES GURNEY called by Petitioner as a witness, having first been duly sworn testified as follows:

Direct Examination.

My name is James Gurney. I am a representative of manufacturers of tools. I have been in that business a little over 20 years. I am a stockholder in The Western Tool & Manufacturing Company, and I am also representing in these proceedings my father, my mother and Mr. Harlan T. Hyde, who are also stockholders. I hold 7 shares of the stock of that company. I am a stockholder of record of 3 shares; the other 4 shares were issued to my sister and transferred to me. My mother is a stockholder of record of 66 shares and Mr. Hyde is a stockholder of record of 104¼ shares that he holds and 443½ that are up on deposit, and my father has on deposit with the voting trustees 59 shares. The total number of shares represented by me in this proceeding is 682 and a fraction, which I think is in excess of 60% of the outstanding shares. I represent Mr. Hyde, my mother and father by proxies and powers of attorney.

Mr. Keifer: "We will agree that he represents them."

The Witness: "I know Mr. Enoch J. Price. He is the father of the gentleman that testified this morning. I had conversations with Mr. Enoch J. Price in May of 1942; I think the first one was in the middle of May. Mr. Price, Mr. Kettering, Mr. Stiefel and I were present in Mr. Price's office in Chicago. I said that there was a demand for tools

now on the part of the various branches of the armed forces and industry and other users that exceeded the supply and I said now is the time or the opportunity for the company to get back on its feet. I also said that there was a substantial amount of the Company's cash on hand, which could be augmented by loans from the Government for the purpose of buying new machinery and equipment to replace the antiquated machinery and equipment and greatly increase production, and at the same time tend to lower the costs of production. I also said that I was a manufacturers' representative and that I could sell the product of the company that would not go directly to the Government, to my other contacts and naturally I expected a commission, which was customarily 10%. I also said that acting on my own initiative I consulted with an outstanding Production Engineer in Chicago who was highly recommended to me by Colonel Slezak, of the Chicago Ordnance District. This engineer said he would come down to the plant and make a study of our plant and products and make recommendations. Mr. Kettering said they would be glad to have him come down at my expense, and I said that I would pay that if they would adopt the engineer's recommendations. I think Mr. Kettering also said that they did not propose to go into debt for any machinery and equipment nor to disburse the company's cash.

Generally speaking, the condition of the Company's machinery and equipment at that time was quite antiquated. I have represented tool manufacturers over 20 years and over the last 5 years my average sales of tools has been in excess of one-half million dollars per year. Some of the contacts that I mentioned to Mr. Kettering and Mr. Price and customers to whom I sell tools are industrials, such as the International Harvester Company, Chicago, Montgomery Ward, Sears, Roebuck & Company, Chicago, the Kimball stores in the Northwest, who operate around 2,500 stores; Western Auto Supply Company on the Pacific Coast, which operate, I believe 500 stores; The Western Auto Supply Company of Kansas City, who operate in excess of 2,000 stores; other syndicates, jobbers and mill supply houses. The first time I requested a change in the policy of the company with respect to improving their machinery and cutting their cost of production and in-

creasing the output was as far back as when I first served on the board of directors, around 1929; I suggested they make changes down there and offer a new product. I had a conversation with Mr. E. J. Price in the latter part of May, 1942. Mr. Price, Mr. Stiefel and I were present. Mr. Stiefel asked Mr. Price if it hadn't been agreed by the Bondholders' Committee that the interest on the bonds be reduced to 4%, and Mr. Price said yes, but they did not have even enough money to pay that much.

I think when I first served as a Director I suggested they get into other lines of tools. I attempted to get orders for them. I contacted Sears, Roebuck & Company two or three years ago with regard to emery wheel dressers, of which they bought quite substantial quantities, and brought a sample down to Springfield and asked the company to prepare something that would approximate it and submit quotations. I think there were some ten or fifteen thousand dressers involved, but it would be a perpetual order, continuous contract arrangement.

No sample was ever prepared nor was a quotation furnished. The rough price would be close to 50c for each dresser."

Stipulation of Counsel that the records of the Voting Trustees disclosed that Harlan T. Hyde is the holder of 443½ shares of the stock of this corporation which has been deposited with the Voting Trustees, and that James Gurney, Junior, the father of the present witness, is the owner of 59 shares, which has been deposited with said Voting Trustees.

Further stipulated that the Stock Register of the corporation affirms that Stella Gurney is the holder of 66 shares of the stock of the corporation and that James Gurney is the holder of 3 shares of stock of the corporation. Further stipulated that Harlan T. Hyde is a stockholder of record of 105 shares and that he holds 2¼ additional shares which on the record stand in the name of O. H. Hyde, which stock certificates have been endorsed to Harlan T. Hyde by O. H. Hyde.

The Witness: "I do not have my stock certificates here. I do not know where they are. I have never sold them or transferred them and I am still the owner and holder of 7 shares of stock of this corporation."

The Court: "What is the par value?"

Mr. Stiefel: "$100.00 par value. It is all common stock."

Cross Examination by Mr. Keifer.

The Witness: "I don't know where my stock certificates are. I attended a meeting of the Board of Directors on September 6, 1941 if the record so states. I don't remember that date. I remember the meeting in Mr. Price's office; there were several meetings. It appears from page 144, exhibit 23 for identification, which purports to be the minutes of the meeting of September 6, 1941 that I made a motion at that meeting. I undoubtedly made it if it is so set forth there.

At the meeting in Mr. Price's office I proposed that I get 10% commission on all sales of the company, excluding sales to the Government. You can neither pay nor receive commission on Government business. It was suggested that Mr. Harlan T. Hyde be employed. He is the largest stockholder, I believe. There was some discussion about it—I don't remember all the details—but the committee found it not desirable. I suggested the employment of Mr. Harlan T. Hyde. I employed Mr. John M. Cole to represent me last July in this matter. I know that the company purchased some bonds from the bondholders at different times at 10, 15 or 20c on the dollar. I knew they were being made and approved of it; it was a matter of record that I voted for it. When I proposed a different policy for the company as to employing engineers and borrowing money the other Directors differed with me. It was their business judgment that that was not the wise thing. At the meeting in Mr. Price's office it was said that that is what wrecked the company in the previous world war. I don't agree with it and I don't think it is the fact. These bonds were not issued to pay off debts for money they had spent for new machinery in the first world war. The occasion of issuing these bonds in 1921 or 1922 was to give the business additional finances and pay off a pressing bank indebtedness and revamp the company so it could put itself back on its regular industrial work. It had been totally on war work. I think it had a big bank indebtedness in 1921.

Re-direct Examination by Mr. Stiefel.

"I don't know whether Mr. Harlan T. Hyde had formerly been employed by the company. In a subsequent conversation with Mr. Price and Mr. Kettering I agreed with them that Mr. Hyde need not be employed."

(Petitioner Rests.)

MR. R. C. CHAPMAN, called as a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct Examination.

"My name is R. C. Chapman. I live in Flossmoor, Illinois, a suburb of Chicago. I am a federal tax consultant. I have been in private practice since 1920. I was never in Government service. Last week I made an examination of the books of The Western Tool & Manufacturing Company with reference to making a Balance Sheet and a Profit and Loss Statement for the year ended December 31, 1942. Exhibits 19 and 20 appear to be typewritten copies of the pencil copies which I furnished of the Balance Sheet as of December 31, 1942 and the Profit and Loss Statement for the year ended December 31, 1942.

$16,000.00 paid by the company in June 1942 on account of the bonded indebtedness did not appear in these statements. It appears on the books of the company. The $16,000.00 represented a portion of interest accrued up to and including December 1941. The said $16,000.00 was charged against operations prior to December 31, 1941. Obviously, on December 31, 1941, it appeared on the books of account as a liability; therefore, when the $16,000.00 was paid it represented liquidation, in part, in an amount of $16,000.00, of a liability of accrued interest appearing on the books as of December 31, 1941, and therefore does not belong in the operations of the company for 1942. The Balance Sheet as of December 31, 1942, shows on the liability side an account designated as "Liability to Bondholders' Trustee." That is the liability, principal and interest, shown by the judgment decree as of December 8, 1942, as reduced during the period December 8th to De-

cember 31st, 1942, before which time, to-wit, in June, 1942, a $16,000.00 accrued interest liability was paid. Therefore, the $16,000.00 would not appear in either the Balance Sheet as of December 31, 1942, or the statement of Profit and Loss under date of December 31, 1942. The item in the Profit and Loss Statement headed "Legal Fees, including Trustee Fee, $4400.93, represented attorneys fees and a $600.00 payment designated on the books of account as Trustee fees paid during 1942. The Trustee's fees were $600.00; legal fees $3800.93. I have a $1500.00 charge against operations for a Receiver's fee for the year 1942, from the time he was appointed Receiver. $2,880.00 is the total amount. The $1,500.00 was in addition to that which had already been drawn by the Receiver. The books showed legal fees of $800.93 in addition to the amount paid under the order of the Court. There are other attorneys fees paid prior to the receivership; to Mr. Enoch J. Price on June 8, 1942, $62.50; April 1, 1942 $100.00, and to Keifer & Keifer on December 30, 1942, $250.00 and $3,000.00, which was allowed by the court on December 23, 1942. The $250.00 might have been a bill prior to the receivership, but that is when it was paid.

The net profit for the year was $78,615.09. I computed an estimated amount of income, income and excess profits tax for 1942. I find that due to their invested capital condition the credits would be very nominal. They are, therefore, subjected to the highest excess profits tax rate of 80% of the net income, or $62,892.07. I have not prepared their income tax report—that was my estimate within a margin of $1,000.00. In the Profit and Loss Statement (Petitioner's exhibit 20) I have a column at the right "Percentages".

In my experience, a manufacturing company, having manufactured its goods, having the selling, general and administrative expense of less than 9% is extremely low. The percentage here is 8.39. With reference to the manufacturing expense, with labor conditions today, I think it is a question of supply and demand. Other than to say these figures appear to be conservative, I wouldn't care to commit myself as being able to use any definite barometer."

Cross Examination by Mr. Stiefel.

The Witness: "I was employed by Mr. Kettering as Receiver to make this examination. I am a certified public accountant. I am not licensed to practice accountancy in the State of Ohio. I made this examination in the State of Ohio at The Western Tool & Manufacturing Company. Selling and general administrative expense of 8.39 is rather low.

I have had experience with companies who sell practically their entire output to the Government, since December 7, 1941. There is considerable sales expense connected with selling to the Government. No commissions are allowable on sales to Government Agencies. Such selling expense consists of traveling expense and the continuance of advertising, which has been recognized by the Treasury Department. By the publicized route, this company spends very, very little for advertising. It spent $661.00 out of a total of $195,000.00. Their expense for advertising was very small. Advertising is a large recognized expense of a concern who transforms its business during the war period by selling to the Government. The expenditure of substantial sums for advertising would raise the general and administrative expense of other concerns I have had experience with even though they sell to the Government, but this company had only $661.00 of selling expense. I cannot tell you whether practically all of the product of this company, which is located in Springfield, Ohio, goes to Wright Field. I don't know where practically all of their product goes. The traveling expense of this company was only $223.75, so that factor was not present as it was with other companies with which I make this comparison of 8.39 being very low. Total sales commissions during the entire year were only $1,200.00 out of almost $200,000.00 of sales. I did not hear the testimony that the normal sales commission is 10%, which would be $19,000.00. An assumption of a commission of 10% might be right for normal sales but not for war contracts.

I made the 8.39 comparison as being low for selling and general administrative expense. Sales commissions of less than 1% of the gross income from sales is low on sales made on other than on war contracts. My records show that there was $250.00 paid to Keifer & Keifer in Decem-

ber of 1942 by the company. I do not know whether it was as attorney for the company nor whether it was for fees earned prior to the receivership, nor do I know whether Keifer & Keifer represented the plaintiff or the company in the foreclosure proceedings. I could not answer whether it is a proper reduction from income for a company to charge legal expenses paid to someone who was not an employee of the company but is paid under order of court to the other side of litigation as that is a legal question, but I did charge that against the income of this company as an expense.

It depends upon who defrays the expense as to whether Trustee's fees paid to a party who is suing the company and is not an employee of the company is a proper charge against income of the company in computing its profits. The basis upon which I made that charge was that it was charged to "Legal Expense" on the books of account of the corporation, and it was paid by the corporation, and as such I regarded it as an expense chargeable to the expenses of the corporation."

The Court: "You did not go back any further?"

The Witness: "No, sir. I was not hired to make an audit. I was merely compiling a statement to make the corporation's income tax from the books. The $16,000.00 paid by the company does not appear either in either Petitioner's exhibit 19 or 20 because that was interest which had accrued prior to December 31, 1941.

It did not pay all the interest which had accrued on December 31, 1941. There was still a balance of interest on the books of the company accrued as of December 31, 1941. I do not recall what the balance was but it was in excess of $10,000.00. On December 31, 1941, after there had been applied the $16,000.00 which was paid in 1942, there still remained accrued interest in excess of $10,000.00.

On January 1, 1942, there was an outstanding liability on bonds, principal amount. From January 1 to December 8, 1942, interest was accruing on those bonds, the amount of which accrued interest for the above period was $5,479.49. On December 8th a judgment was entered, which is already in the record, in the sum of some $134,000.00.

On December 23rd a payment was made on that judgment in an amount of $7,310.00. Some $442.00 of that

amount represented accrued interest on the judgment from December 8 to December 23, 1942. The balance of some $6,800.00 represented payment on the principal, from December 23 to December 31, 1942. The books did not so allocate it; I did by referring to the judgment decree, determining what interest the principal amount of the judgment was to carry, paying the interest and taking it from the $7,300.00, gave me the amount of principal to apply. That is how I arrived at the amount of $6,800.00. Interest accrued from December 23 to December 31 on the then balance of the judgment after the payment of the $7,310.00. Hence the statement of Profit and Loss for the year ended December 31, 1942, shows the interest accruing and properly chargeable against the operations of the corporation from January 1 to December 31, 1942. I accrued the interest for the period of January 1 to December 31, 1942 at 8%. I did this because of the stipulation of the judgment, which was the only evidence I was given, which showed the interest rate to be 8%, so I used 8%.

With respect to the Receiver's fees of $2,880.00, that represents the total amount paid as compensation to Mr. Kettering as Receiver from the time of his appointment to December 31, 1942. The $1,500.00 item is included in there. Of the $62,000.00 income tax liability, 25% is payable in March of 1943, which would be approximately between $15,000.00 and $16,000.00. The corporation has tax anticipation warrants with a par value in excess of $20,000.00 with which to meet that payment."

Mr. Keifer: "I would like to make a professional statement. Notwithstanding the testimony, there was not $250.00 paid to Keifer & Keifer in December, 1942. It was for services rendered prior to receivership and paid prior to receivership, and I do not know how the accountant got the information which he got, but there is an error there somewhere."

Mr. Stiefel: "As attorney for the company for services?"

Mr. Keifer: "Rendered prior to the receivership".

Mr. Stiefel: "And the $3,000.00 was paid to you as attorney for whom?"

Mr. Keifer: "The court ordered it paid".

Mr. Stiefel: "Whom did you represent when the court ordered it paid?"

Mr. Keifer: "We represented the plaintiff and were appointed by the court to represent the receiver."

Mr. Stiefel: "In other words, you represented the company up to July and represented the plaintiff who is suing the company after July".

Mr. Keifer: "Yes, sir, if you want to put it that way, under the orders of the court."

Mr. Stiefel: "You were not retained by the court to represent the company in the foreclosure proceeding, were you, Mr. Keifer?"

Mr. Keifer: "No, but the payment was made by order of the court."

MR. W. W. KEIFER, called as a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct Examination by Mr. Griffith.

I was counsel in the foreclosure of the mortgage in the Court of Common Pleas of Clark County, Ohio. Mr. John M. Cole represented Mr. Gurney and the other parties that he represented. Mr. Cole is an attorney at law of Springfield, Ohio. In July he came to me and said he represented them and we had some discussion of the matter, conferences about it, several, and he said that Mr. Gurney was objecting to the proceeding, and I told him that we expected to ask for judgment, and he wanted that postponed. We finally agreed to let the matter go over until after the summer vacation, which was September. Mr. Cole was given a copy of the Petition, after he spoke to me, and a copy of every paper filed in the case in connection with this foreclosure case as long as he represented Mr. Gurney. Nothing more was said or done about it until the 24th of October, when I saw Mr. Cole and told him that our client thought we ought to take judgment and I proposed to ask for judgment in the case. After some conferences he said "Let it go a little while," and I agreed to. Nothing further was done until the 3rd of December, when I notified Mr. Cole that we proposed to call the matter up to the court and ask for judgment on December 8th. He then told me that he did not represent Mr. Gur-

ney any longer but that he would notify Mr. Stiefel, with whom he was in correspondence, of my notice. In accordance with that notice we went before Judge Davis, of the Common Pleas Court, and asked for judgment in accordance with the pleadings, by default, and Mr. Cole attended. He said he attended because he wanted to explain to the court his connection with the matter. He said he no longer represented Mr. Gurney but that he had notified Mr. Stiefel immediately upon getting a notice from me on the 3rd of December and Mr. Stiefel did not want judgment entered. But Judge Davis said the time had gone along and he thought everybody had had an opportunity and he rendered judgment and approved the entry. A copy of that entry I gave to Mr. Cole that day. He said he wanted to send it to Mr. Stiefel. The papers that they have here today of the proceedings in the foreclosure case are the same papers, I am sure, that I gave to Mr. Cole during the time the case was pending from July up until December. I do not believe there is any other matter I wish to speak about.

Cross Examination by Mr. Stiefel.

I would not know whether I first spoke to Mr. Cole with reference to the foreclosure matter on or about July 22, 1942. His son first spoke to me, but later John Cole spoke to me. He said he was going to make objections, but he never did. He did not say he was going to file an intervening petition. The only meeting we had in Judge Davis' chambers at which Mr. Cole was present was the day we took judgment. Mr. Cole did mention that he was going to ask for the discharge of Mr. Kettering as Receiver because Mr. Kettering was not a resident of the State of Ohio. I don't know that he said he was going to apply for it but he mentioned his being a nonresident of Ohio as an objection to his being Receiver.

The matter went over from July until the fall term. In August I underwent an operation. I don't remember that Judge Davis had an elderly sister who was in her last illness and that he opened court on September 19th and immediately vacated all assignments until the October term. He had a sister who was ill and on account of that he did not hold court for some time. He held some court,

probably just formal matters. I don't know. Mr. Cole did not mention to me on or about December 3rd that Mr. Gurney's father was very ill, that Mr. Gurney could not come down to Springfield at that particular time. I think he said Mr. Stiefel wanted it postponed for that reason, but there had been so many postponements. In July he asked to have it postponed and we agreed to it. In October he asked to have it postponed and I agreed to it.

I think Mr. Murray filed a motion to vacate the foreclosure judgment on January 6th. I do not remember that at the time judgment in the foreclosure suit was entered Judge Davis stated to Mr. Cole that he would not have entered the judgment were it not for the fact that under the law of Ohio he may entertain a motion to vacate the same at any time before the opening of court at the next term, which would not be until January 2, 1943. He said something about there might be an application during term to vacate it if there was ground for it. I do not recall whether Judge Davis stated to Mr. Cole that if a proper showing were made before January 2, 1943, he would be glad to entertain such a motion so as not to preclude the stockholders from offering any legitimate defense they might have."

The Court: "Was there a hearing then?"

The Witness: That was filed just two days before this proceeding was brought."

Mr. Stiefel: "Mr. Murray advised me the motion was made in apt time, as the term was extended until January 9th, and Mr. Murray then presented a motion to vacate."

Mr. Murray? "On January 6th."

Mr. Stiefel: "That has been superseded by this petition."

The Witness: "Yes, I think I know Mr. John M. Cole's signature. I have no doubt this is his signature on Petitioner's exhibit 24 for identification. It looks like it."

The Court: "What is the pertinency of this? This is all over in the State Court."

Mr. Stiefel: "Apparently Mr. Keifer's testimony is directed to the point that we slept on our rights in the state court proceedings. I don't know what other purpose there was to Mr. Keifer's testimony. So my purpose in cross examination is to show that Mr. Cole was there protecting our rights, that none of our rights were slept on

because of anything Mr. Cole did, and I am offering here, or will offer Mr. Cole's letters to me stating just what took place throughout these proceedings in the state court. That is my only knowledge, of course."

The Court: "Is that your claim, that they slept on their rights?"

The Witness: "Yes. They knew about this from the beginning and made no question about the interest, made no question about the voting trust or anything, and all these complaints were open for five months before that judgment was entered and nothing was done."

Mr. Stiefel: "I have voluminous correspondence here from Mr. Cole as to the steps he took and the reasons for various delays."

Mr. H. S. Keifer: "We object to him introducing that stuff. Mr. Cole never filed a paper in the Common Pleas Court."

The Court: "The proper way to get that is to have Mr. Cole testify."

The Witness: "The statement in that letter is not materially different from mine. There was some statement made they might make a motion to set aside the judgment if there was ground for it, and that proceeding would come up if this proceeding does not supersede it, and if there was ground for setting aside the judgment, that is up to the court."

Mr. Stiefel: "As disclosed by this correspondence."

The Court: "Gentlemen, if there is any objection to the correspondence I will have to sustain it. That correspondence is between you and Mr. Cole. I don't think it should be admitted in evidence. I am not sure what position counsel are taking. Would you want to offer that in evidence?"

Mr. Stiefel: "I would, your Honor."

The Court: "If you do, you may have it marked for identification and offer it when you get back to the rebuttal."

Re-direct Examination by Mr. Griffith.

The Witness: "I am able to recall that Mr. Cole made some such statement to the court on the day that the order of sale was taken that he did not see any reason why it should not be granted."

Re-cross Examination.

The Witness: "Prior to July, 1942, I was the attorney for The Western Tool & Manufacturing Company. I don't know whether it was right up to that date or not. I received $250.00 from the company as fees for services rendered prior to July, 1942, and in the year 1942.

In July 1942 I filed a foreclosure action against the company in which I represented the Trustee for the Bondholders, who was in a sense an adverse party to the company. I received $3,000.00 in fees in that foreclosure suit. The $3,000.00 was paid by the Receiver by order of the Court. The foreclosure proceeding has never been completed by the sale of the property but my $3,000.00 for fees on account of services rendered has been paid. There were no more fees than $3,000.00 allowed in that case. By "on account" I mean on account of services in the receivership case. It wasn't paid for any particular time or any particular date. The order of the Court expresses it. We represented the Receiver in that case also by order of the Court. I think the order provides a fee for representing the plaintiff and the Receiver. I won't be certain about that."

Page 144 of exhibit 23 was offered in evidence by respondent.

The Court: "It may be admitted and the Court Reporter may copy it in the record."

Pages 103 and 104 of exhibit 23, being the minutes of the annual meeting of January 26, 1935 and pages 112, 113 and 114 of exhibit 23, being the minutes of the annual meeting of the company of February 1, 1936, were offered in evidence.

The Court: (to Mr. Stiefel) "I will let them be admitted at this time subject to your objection. You may go through them afterward and if you have any objection point it out in your brief."

The Court: "Any rebuttal?"

Petitioners' exhibits 24 to 30 both inclusive, for identification, were offered by Petitioner, being the letters from Mr. Cole to Mr. Stiefel.

The Court: "I will sustain the objection."

The Court: "They will not be competent but you can take Mr. Cole's deposition, if you wish. Or if you wish to

come back you can have him come back and testify, if counsel wish, if you think it is necessary to do either."

Mr. Stiefel: "I wish to say this. At the present moment I certainly do not feel it is necessary to take up any more of the Court's time either by Mr. Cole's testimony or deposition. However, if the Court feels that there is any need for it I will be only too glad to have Mr. Cole's deposition taken and the substance of these letters testified to."

The Court: "I don't want that responsibility put on the Court. Whether or not there is any need for it is a matter counsel will have to determine. I am perfectly willing to grant you opportunity to take his deposition if you wish to. That is up to you."

Mr. Stiefel: "I will ask the Court not to make me decide that question at the present moment. I would want to think it over."

The Court: "Let the Court and Mr. Keifer know within a reasonable time. How long do you want?"

Mr. Stiefel: "Mr. Murray and I can decide that this evening but I would like four or five days."

The Court: "Let me know not later than a week from today whether or not you want to take his deposition. Meantime you can send a notice and let it be taken. Is there anything further in rebuttal?"

Mr. W. W. Keifer: "For the record I think we should make a motion to dismiss the petition on the testimony they have offered."

The Court: "All right."

The Court: "Let it be submitted on briefs. If you are going to wait on the transcript we cannot fix a time now. If you are not going to wait on the transcript, we can fix a time."

Which was all the evidence offered and received upon the hearing of said cause.

Parts of exhibits 22 and 23 which were offered and received in evidence and made a part of the transcript in this cause:

From Exhibit 22—Article 2. P. 5-6.

Constitution and By-Laws.

Article 1. Meeting of Stockholders.

The annual meeting of the Stockholders shall be held at

the Office of the Company, in Springfield, Ohio, on the second Monday in January of each year; and special meetings may be held at such times and places as may be ordered by the Board of Directors. Notice of such annual and special meetings shall be given to each stockholder appearing as such upon the books of the Company, by duly mailing the same to his address ten days prior to the date of the meeting. Three fifths of all the Stockholders shall constitute a quorum.

Article 2. Election of Directors.

The election of Directors shall take place at the annual meeting of Stockholders, or at a speeial meeting called for that purpose, and shall be by ballot; provided, that if such election be not held at an annual or special meeting, it may be held at a stockholders' at which all stockholders are present in person or by proxy. Directors shall be elected for one year, and shall continue in office until their successors are elected and qualified. The number of Directors shall be determined by resolution of the Stockholders but shall not be less than five nor more than fifteen.

FROM EXHIBIT 23—P. 10.

AMENDMENTS TO CONSTITUTION AND BY-LAWS.

Art. 1. Constitution, amended January 1906—The Date of semi-annual Stockholders meeting be changed hereafter to the second Wednesday in July.

Amendment to By-Laws.

Moved by J. W. Tremayne Seconded by Jas. Gurney, Jr., that date of Annual Stock-holders meeting be changed hereafter to the 4th Tuesday in January until further notice.

Amendment to By-Laws.

Moved that Article 2 of Constitution where it states that *all* Stockholders must be either present in person or by Proxy at any Special called of Stockholders for the election of Directors shall be changed to read three-fifths.

FROM EXHIBIT 23—P. 141.

March 28, 1941

The annual meeting of the stockholders of the Western Tool & Manufacturing Company was held in the office of

the company at Springfield, Ohio, Friday morning, March 28, 1941 at ten o'clock. The following were present representing 648-1/2 shares of stock out of 1120-1/2 shares: E. J. Price and W. T. Kettering of Chicago and Wm. J. Grim and Mrs. E. H. Wheeler of Springfield, Ohio.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Kettering, seconded by Mr. Grim, that the following resolution be adopted:

"Be it resolved that the number of directors of the Western Tool & Manufacturing Company be reduced to five, beginning with this annual meeting, held on this date, March 28-1941." This is done in order that a quorum would always be assured. The motion carried.

It was moved by Mr. Kettering—seconded by Mr. Grim, that the rules be suspended and the secretary be authorized to cast a ballot for election of the five directors—namely: E. J. Price, Wm. T. Kettering, James G. Gurney, Wm. J. Grim and Mrs. E. H. Wheeler. The motion carried.

The meeting then adjourned.

E. H. Wheeler, *Secy.*

From Exhibit 23—P. 142.

March 28—1941

Immediately following the annual stockholders' meeting held March 28—1941, a directors meeting was held and attended by E. J. Price, W. T. Kettering, Wm. J. Grim and Mrs. E. H. Wheeler—Mr. Gurney was unable to be present.

Mr. Grim served as temporary chairman and Mrs. Wheeler—secretary.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Price—seconded by Mr. Kettering that the rules be suspended and the secretary authorized to cast a ballot for the election of the same officers as had served the year previous—namely E. J. Price—Pres. W. F. Kettering, Vice Pres., and E. H. Wheeler—Secy., Treas. and Mgr. The motion carried.

The directors then recessed until 2 P.M. The meeting reconvened at 2:30 P. M. with Mr. Price presiding.

The first topic of discussion was tubing for our mandrels and it was agreed that sufficient quantities should be ordered.

The cost of racks was discussed and a change in list prices recommended.

Mr. Grim agreed to see Mr. Ansevin with regard to the rental of our factory space and foundry.

Mrs. Wheeler was requested to ask Mr. Boblitt about renting our planer which he has been wanting to acquire for several years.

Mr. Price and Mr. Kettering agreed to the same compensation for the coming year and it was moved by Mr. Price, seconded by Mr. Kettering that Mrs. Wheeler be paid $35.00 per week, effective April 1, 1941. The motion carried.

A discussion on bond interest followed. It was moved by Mr. Kettering, seconded by Mr. Grim, that a distribution of interest be made as of May-1-1941 amounting to 8%. The motion carried. This—it was stated, will pay * the balance of interest due for the year 1927 at the rate of 6%, and the interest for the full year of 1928 * The treasurer was therefore directed to deposit with the Trust Co. of Chicago a sum necessary to pay the 8% on certificates of deposit with the company.

The meeting then adjourned.

E. H. Wheeler, *Secy.*

* Correction—
2% balance of 1927—all of 1928 at 6% and 1% on 1929

The minutes were read and after correction as above, were approved.

Sept. 6—1941 E. H. Wheeler, *Secy.*

From Exhibit 23—P. 146.

Springfield, Ohio.

The annual meeting of the stockholders of the Western Tool & Manufacturing Company was held in the office of the company at Springfield, Ohio, Friday afternoon, March 27—1942 at four o'clock. The following were present: Mr. E. J. Price, Mr. W. T. Kettering (640), both of Chicago—Mr. W. J. Grim (1), Mrs. Leah Saum (10) and Mrs.

Erna H. Wheeler (7½) of Springfield. Mr. Price presided as Chairman and Mrs. Wheeler served as secretary.

The minutes of the previous meeting were read and approved.

A report was submitted by Mr. Price and a comparison of sales for the past twelve years was made and discussed.

It was moved and seconded that the rules be waived and the same five directors be elected to serve for the current year—namely—Mr. Price, Mr. Kettering, Mr. James G. Gurney, Mr. Grim and Mrs. Wheeler. The motion carried.

Mrs. Saum inquired into the possibility of disposing of her ten shares of stock. Mr. Kettering made her an offer of twenty dollars for her ten shares which she emphatically refused. Mr. Price then promised her that he would do the best possible for her, and get her as much as he could for her stock.

There being no further business—the meeting adjourned.

Erna H. Wheeler
Secretary.

From Exhibit 23—P. 147-148.

Springfield, Ohio.

The annual meeting of the directors of the Western Tool & Manufacturing Company was held Friday afternoon March 27—1942 at five o'clock with four of the five newly elected directors being present namely: Mr. Price—Mr. Kettering, Mr. Grim and Mrs. Wheeler. Mr. Gurney was unable to attend.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Grim—seconded by Mr. Kettering that the rules be suspended and the secretary be authorized to cast a ballot for the election of the same officers as had served the previous year—namely: Mr. Enoch J. Price—President; Mr. W. T. Kettering, Vice-Pres., and Mrs. E. H. Wheeler—Secy., Treas. & Mgr. The motion carried. This completed the organization.

Mr. Price requested that State and Federal taxes be segregated.

The large number of mandrel orders and ways and means of manufacture were discussed at length, and it was decided that Mr. Kettering should go to Wright Field to look into the subject.

With regard to the taking up of certificates of deposit—Mr. Price stated he did not anticipate any offers being made to him in the immediate future. Mr. Price said he thinks it advisable to take in all we can get.

A motion was made by Mr. Kettering, seconded by Mr. Grim that the following resolution be adopted—The motion carried:

"Resolved that the treasurer be authorized to advance to the Bondholders Committee a sum not exceeding one-thousand dollars as may be requested for the expenses of the Committee—proper credit to be given in future settlement between the Committee and the company. At this point the meeting adjourned for the day, until Saturday—March 28, 1942.

The annual meeting of the directors reconvened Saturday morning March 28—at nine o'clock.

It was moved by Mr. Kettering, seconded by Mr. Grim that both Mr. Wagner & Mrs. Wheeler be given an increase of five dollars per week beginning April 1. The motion carried. It was moved by Mr. Grim, seconded by Mrs. Wheeler that Mr. Price be paid $400.00 annually—payable one-hundred dollars quarterly. The motion carried.

The question of painting the factory was brought up and discussed, but nothing definite decided upon.

The directors agreed that the space between the main factory building and forge room should be enclosed—thus providing additional factory space at a low cost.

Mr. Kettering then gave a report on the meeting of manufacturers held at Hotel Gibson Cincinnati on March 26—after which the meeting adjourned.

Erna H. Wheeler *Secy.*

From Exhibit 23—P. 144-5.

Springfield, Ohio.
Sept. 6—1941

A meeting of the five directors of the Western Tool & Mfg. Co., Mr. Price, Mr. Kettering, Mr. Gurney, Mr. Grim

and Mrs. Wheeler, met in the office of Mr. Price in the Conway Bldg., Chicago—on Saturday—September 6—1941.

The minutes of the previous meeting were read and approved, as corrected by Mr. Price.

The Capital Stock tax was discussed at length and it was decided to place the capital stock at $100,000—the tax rate being 1¼%. A motion to this effect made by Mr. Gurney and seconded by Mrs. Wheeler—carried.

Mr. Price suggested that in the balance sheets the Federal and State Taxes be segregated.

The subject of "Priority" was also discussed but nothing definite was determined.

It was suggested that the foundry tenants draw up a lease and submit it to the Board.

It was moved and seconded that Mr. Kettering be authorized to get estimates on a gas engine for power in the factory and submit same to the other members of the Board for approval and authority to proceed with the installation. The motion carried.

It was moved by Mr. Kettering, seconded by Mrs. Wheeler that the president be authorized to take up Certificates of Deposit not exceeding $2500.00 at a price not exceeding 25c on the dollar. The motion carried.

The manager was authorized to secure estimates on a stoker for heating the factory, and upon the approval of Mr. Kettering and Mr. Grim, it is to be purchased and installed.

The motion carried.

It was moved by Mr. Kettering, seconded by Mr. Grim, that we pay 5% interest on bonds which will cover the remaining 2% for May 1929 and 3% for Nov 1—1929. The meeting then adjourned.

E. H. Wheeler—*Secy.*

From Exhibit 23—P. 103-4.

Springfield, Ohio.

The annual meeting of the stockholders of the Western Tool & Mfg. Co., was held in the offices of the company at Springfield, Ohio, Saturday—January 26—1935 at 12M. The following were present: Mr. Enoch J. Price, Mr.

W. T. Kettering—both of Chicago—Mrs. Leah Saum, Mr. O. H. Rust and Mrs. E. H. Wheeler—of Springfield. The following stock was represented:

Mr. Price	640 shares	(Trustee for Bondholders)
Mrs. Saum	10 "	
~~Mr. Rust~~	~~2~~ "	
Mrs. Wheeler	2½ "	
	654½ "	

Stock not represented:

H. Morris	61¾ shares	
J. W. Tremayne	60 "	
Gurneys	73 "	
J. Z. Wells	~~5~~ "	EHW
J. S. Crowell	134 "	
H. T. Hyde	105 "	
O. H. Hyde	2¼ "	
E. K. Stitt	25 "	
	466 "	

It was moved by Mr. Kettering, seconded by Mr. Rust that Mr. Price act as chairman and Mrs. Wheeler secretary. The motion carried thus completing the temporary organization. The minutes of the previous meeting were read and approved.

The secretary was authorized to cast a ballot for the election of the seven directors who had served the previous year, and the election of the following was unanimous: Mr. Price, Mr. Kettering, Mr. James G. Gurney, Mr. Harlan T. Hyde, Mr. O. H. Hyde, Mr. Rust and Mrs. Wheeler.

Mrs. Saum wanted to know why no dividend had been declared for the last fourteen years. This was explained by the secretary.

The meeting then adjourned.

E. H. Wheeler *Secy.*

From Exhibit 23—P. 112-114.

The annual meeting of the stockholders of the Western Tool & Mfg. Co. was held Saturday, February 1, 1936

at the home of the president, Mr. Enoch J. Price—2124 West 112th St., Chicago—

The following stock was represented:

Mr. Price—	640	shares
Mrs. E. H. Wheeler	2½	"

These two officers and Mr. W. T. Kettering were the only ones present, although formal notices were mailed to all stockholders Jan. 14—1936 two weeks in advance of the meeting.

Mr. Price presided and Mrs. Wheeler served as Secretary.

It was moved and seconded that the secretary be authorized to cast a ballot for the election of the seven directors who had served the previous year. The seven directors are Enoch J. Price, Wm. T. Kettering, James G. Gurney, Harlan T. Hyde, O. H. Hyde, O. H. Rust and E. H. Wheeler. The motion carried.

Owing to the small attendance at the meeting no other business was transacted altho a numerous items were discussed, after which the meeting adjourned.

E. H. Wheeler—*Secy.*

Since a quorum of the directors was not present—a directors meeting could not be held. Therefore it was understood that the officers for the previous year should continue until a meeting of the directors could be held.

PETITIONER'S EXHIBIT 1.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff,
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

PETITION.

(Filed July 9, 1942.)

1. The Plaintiff, Owen N. Price, Trustee under a certain Mortgage Deed of Trust hereinafter set forth, says that the Defendant, The Western Tool & Manufacturing Company is a corporation duly organized and existing under the laws of the State of Ohio, with its principal office in the City of Springfield, Ohio.

2. On or about the 1st day of November, 1921, said Defendant for the purpose of borrowing money for the transaction and extension of its business, the funding of its indebtedness, the acquisition of additional working capital and other lawful purposes, pursuant to due authority of its Board of Directors and stockholders, authorized the making and issuing of its coupon bonds to the aggregate amount of $100,000.00, payable in gold coin of the United States of America of the then standard of weight and fineness, and, in accordance with such authority, said Defendant did, for full and adequate consideration by it received, issue and deliver its coupon bonds in the aggregate sum of $90,000.00 to divers persons, whereby said Defendant promised to pay to the bearer of each bond the amount of same at a certain date for each bond, the last maturity date thereof being November 1, 1931, together with interest thereon at eight per centum (8%) per annum from November 1, 1921, on the first days of May and November of each year upon presentation and surrender, as they

severally should mature, of the coupons for such interest annexed to said bonds; and each of the bonds so issued was signed by the President of the Company with the corporate seal of the Company thereto affixed, attested by its Secretary, and authenticated by a certificate endorsed thereon signed by the Trustees of the Mortgage Deed of Trust hereinafter mentioned.

3. On or about the 1st day of November, 1921, said Defendant, pursuant to due corporate action of its Board of Directors and stockholders, duly made and executed under its corporate seal and delivered to The American Trust & Savings Bank, a corporation organized and existing under the laws of the State of Ohio, and Earl K. Stitt of the City of Chicago, Illinois, as Trustees, its certain Mortgage Deed of Trust, dated November 1, 1921, (but actually executed and entered into November 28, 1921), whereby, in order to secure the payment of the principal and interest of all the said bonds at any time issued and outstanding, and to secure the performance of all of the covenants and conditions in said Mortgage Deed of Trust, it granted, conveyed, assigned and transferred to said The American Trust & Savings Bank and said Earl K. Stitt as Trustees and their successor or successors in the trust thereby created, the following described real estate:

• • • • • • • • • • •

5. (f) It was further provided that in case default should be made in the payment of principal or interest on any of such bonds and such default continue for a period of 30 days, or in case default should be made in the due observance or performance of any other covenant or condition of said Mortgage to be performed by the Defendant and any such default should continue for 30 days after written demand by the Trustees for performance thereof, then in such case the Trustees personally or by attorney and in their discretion might:

(1) Enter upon the mortgaged property and exclude the Defendant therefrom, might use, operate and manage the same and in general carry on the business of Defendant as fully as it might have done if in possession thereof, including the maintaining and restoring, and insuring said property as was usual with companies of like character, and collect and receive all earnings, incomes and profits

of the same, using the moneys arising therefrom in payment of interest and principal of said bonds; or,

(2) Might, and, upon request of holders of one-fourth in amount of said bonds and upon being indemnified to their satisfaction, should by suit or suits in equity or at law proceed for foreclosure of said Mortgage or for the enforcement of any other appropriate legal or equitable remedy to protect and enforce their rights and the rights of said bondholders.

And further, that in case of default in payment of principal or interest, continuing for thirty days, upon demand, the Trustees would be entitled to recover judgment for the amount due.

* * * * * * * * * * *

5. (h) It was further provided that in the event of a proceeding to foreclose said Mortgage the Trustee should as a matter of right and without reference to the adequacy of the security for said bonds and without regard to the solvency of the maker thereof be entitled to have a receiver appointed for the mortgaged property and the rents, issues, incomes and profits thereof, and such receiver might be appointed in such proceeding forthwith or at any time and without notice to said Defendant and during the period of such receivership such receiver should collect the rents, issues, income and profits of the mortgaged property and apply same to the payment of the expenses of operating the same, taxes, assessments and insurance premiums thereon, the repairs and maintenance thereof and the surplus, if any, upon the mortgage debt.

* * * * * * * * * * *

7. Interest upon the $90,000.00 of bonds issued as aforesaid was paid up to the 1st day of May, 1923 at the rate of 8 per centum per annum; upon $89,700.00 of said bonds at the rate of 6½ per centum from May 1, 1923, to May 1, 1924, and upon $89,700.00 of bonds at the rate of 6 per centum per annum from May 1, 1924, to November 1, 1929.

Thereafter the Defendant purchased $16,600.00 face value of said bonds and thereby the same were canceled, and thereafter, on June 16, 1942, the Company paid to the Bondholders' Protective Committee, (hereinafter referred to) the sum of $16,000.00 to be applied upon bonds held by that Committee.

8. On or about November 1, 1923, a Bondholders' Protective Agreement was entered into by the holders of $89,700.00 of said issued bonds, (being all of the issued bonds except three bonds of $100.00 each,) and thereby a Committee, consisting of Charles S. Deneen, Chairman, W. T. Kettering, Edward I. Bloom, W. D. Hollister and E. J. Price, Secretary, was constituted to whom were transferred all of said $89,700.00 of bonds with power to control same as the legal owners thereof. Said bonds were deposited with a depositary and certificates of deposit therefor were duly issued. The payments of interest at a rate less than that specified in the bonds and Mortgage for the time as above stated were made by agreement with said Committee.

• • • • • • • • • • •

11. The holders of more than one-fourth of said bonds now outstanding have in writing requested and directed the Plaintiff as such Trustee to proceed and enforce the rights of said bondholders under said Mortgage Deed of Trust by bringing this suit for foreclosure of said Mortgage and for the enforcement of such other appropriate remedies as may be deemed most effectual to protect and enforce such rights, including the appointment of a receiver for the property and assets of said Company.

12. By reason of the premises default has been made in compliance with the terms and conditions of said bond and the conditions of said Mortgage have become and are broken; that by reason thereof the Plaintiff has become entitled to take possession of the mortgaged property and all current assets and to exclude the Company therefrom, and is entitled to bring this action for the foreclosure of said Mortgage.

13. This is an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property, and said mortgaged property is in danger of being lost or materially injured, the condition of the Mortgage has not been performed and the mortgaged property is insufficient to discharge the mortgage debt; and therefore the Plaintiff is entitled to have a receiver for the property of the Defendant appointed herein in compliance with the terms and stipulations of said Mortgage Deed of Trust.

14. Plaintiff further says that the Defendant in the operation of its factory and plant is actively engaged in

the production of war materials and equipment for the production of war materials and munitions for the armed forces of the United States under contracts with the Government and under sub-contracts with contractors with the Government of the United States and the continuance of the operation and production of said war materials is necessary and required by the Government of the United States for the proper carrying on of the war by the armed forces of the Government.

• • • • • • • • • • •

16. Wherefore, the plaintiff prays:

• • • • • • • • • • •

(c) That said Mortgage may be foreclosed by proper decree of this Court;

• • • • • • • • • • •

(e) That pending this suit the Court appoint a receiver for all the property, real and personal, and of whatever nature, of the Defendant, The Western Tool & Manufacturing Company, with appropriate powers to protect and manage the same, to take inventory thereof, to collect the debts and accounts due to Defendant, to continue and carry on the business of said Company and to exercise such other powers as may be necessary and appropriate in the premises;

• • • • • • • • • • •

PETITIONER'S EXHIBIT 2.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, Trustee,
Plaintiff.

vs.

The Western Tool & Manufacturing Company,
Defendant.

ANSWER.

(Filed July 13, 1942.)

Now comes the Defendant, The Western Tool & Manufacturing Company, and waives the issuing and service of summons for it, and enters its appearance in this action.

This Defendant admits the truth of all the allegations in the Petition herein and consents to the appointment of a receiver herein as prayed for in the Petition.

W. H. GRIFFITH,
Attorney for Defendant.

State of Illinois, }
County of Cook, } ss.

Enoch J. Price, being first duly sworn, says that the above named Defendant, The Western Tool & Manufacturing Company, is a corporation; that he is the President of said corporation, duly authorized in the premises and that the statements in the foregoing Answer of said Defendant are true as he believes.

ENOCH J. PRICE.

Sworn to and subscribed before me this ..... day of July, 1942.

GEORGE A. MARTIN,
Notary Public,
Cook County, Ill.

PETITIONER'S EXHIBIT 3.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff.
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

AMENDMENT TO ANSWER.

(Filed July ...., 1942.)

Now comes The Western Tool & Manufacturing Company and by way of Amendment to and additional Answer herein says that the $300.00 of bonds mentioned in paragraphs 8 and 9 of the Petition herein are barred by the Statute of Limitations since they became due more than 15 years prior to the beginning of this suit and no payments either of principal or interest have been made thereon since the payment of interest thereon on or about May 1, 1923, and more than 15 years prior to the beginning of the suit.

Wherefore, the Defendant asks that no judgment or decree be made herein for the recovery of said bonds or for the payment of any principal or interest thereon.

.....
(Wm. H. Griffith)
Attorney for Defendant.

State of Illinois, }
County of Cook, } ss.

Enoch J. Price, being first duly sworn, says that the above named Defendant, The Western Tool & Manufacturing Company is a corporation; that he is the President

of said corporation, duly authorized in said premises, and that he believes the statements in the foregoing Amendment to the Answer are true.

.....

Sworn to and subscribed before me this ..... day of ..... 1942.

.....

Notary Public.

PETITIONER'S EXHIBIT 4.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff,
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

ENTRY OF JUDGMENT AND ORDER OF FORECLOSURE.

This day this cause, having been regularly assigned for trial, came on for hearing upon the Petition, the Answer, the Amendment to the Answer of the Defendant and upon the evidence and was submitted to the Court. Upon consideration whereof the Court finds that the Defendant has been duly served with summons herein, has entered its appearance and filed an Answer admitting the truth of all the allegations of the Petition herein; that the averments of the Petition and of the Amendment to the Answer are

true and that there is due from the Defendant upon the bonds set forth in the Petition, including interest at eight (8) per cent per annum to this date, the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight and 21/100 ($134,698.21) Dollars; that three of said bonds, being Nos. 98, 99 and 100, each for $100.00, are barred from any recovery against the Defendant by the statute of limitations in accordance with the averments of the Amendment to the Answer herein; that the Plaintiff as Trustee for said bondholders is the owner and holder of the mortgage upon the property and assets of the Defendant, as set forth in the Petition, and the same is a valid first lien upon said property; and that the Plaintiff is entitled to have the said mortgage foreclosed and the property herein described sold for the purpose of paying the said amount due upon said bonds.

It is therefore by the Court CONSIDERED AND ADJUDGED that the Plaintiff, Owen N. Price as Trustee recover of the Defendant, The Western Tool & Manufacturing Company the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight and 21/100 ($134,698.21) Dollars, the same to bear interest from this date at the rate of eight (8) per cent per annum.

It is further ORDERED AND DECREED that unless the Defendant, The Western Tool & Manufacturing Company, shall within three (3) days from this date pay or cause to be paid to the Plaintiff the sum hereinabove found due and to the Clerk of this Court the costs of this action, the Defendant's equity of redemption be foreclosed; that the real estate and property described in the Petition be sold and that an order of sale issue therefor to the Sheriff of Clark County, Ohio, directing him to cause to be appraised, advertised and sold as upon execution the following described property, towit:

Situate in the City of Springfield, County of Clark and State of Ohio:

Being part of the southeast quarter of Section Number Twenty-eight (28) of Township Number Five (5), in Range Number Nine (9), M. R. S.; beginning at an iron pin in the north marginal line of Pleasant Street and at the southeast corner of a lot formerly owned by The Owen Machine Tool Company; said point being

five hundred thirty-nine and five tenths (539.5) feet from an iron pin at the point of intersection of the north marginal line of Pleasant Street with the east marginal line of Burt Street; thence northeastwardly with the east line of said Owen Machine Tool Company three hundred ninety-six and ninety-five hundredths (396.95) feet to an iron pin in the south right of way line of the Detroit, Toledo & Ironton Railroad; thence southeastwardly with said right of way line one thousand one hundred thirty-eight and twenty-five hundreths (1138.25) feet, more or less, to an iron bar in the west line of Belmont Avenue; thence with the west line of Belmont Avenue, in a southwesterly direction three hundred sixty-one and five-tenths (361.5) feet to an iron bar in the north line of Pleasant Street; thence with the north line of Pleasant Street, in a northwesterly direction one thousand one hundred thirty-four and seventy-five hundredths (1134.75) feet, more or less, to the place of beginning, containing nine and ninety hundredths (9.90) acres, and being the same premises conveyed to The Western Tool & Manufacturing Company by three separate deeds from I. Ward Frey, Trustee, et al., recorded respectively in Volume 159, pages 257 and 258, Volume 159, pages 255-257, and volume 208, pages 583-585, of Deed Records of Clark County, Ohio.

All other real estate, leaseholds, chattels, real and equitable and other interests in real estate which the Defendant now owns.

Also, all buildings, structures, erections and constructions now placed on the above described real estate, with their fixtures and appurtenances.

Also, the existing plants and factories of the Defendant located on said real estate and any and all additions to and extensions of the said plants and factories, and all of the engines, boilers, belting, shafting, fixed and movable machinery, with their spare parts and attachments, fans, blowers, awnings, steam, gas and water pipes, blast and shaving pipes, all steam and heating apparatus, gas fixtures, ovens, melting furnaces, stacks, cupolas, forges, fire extinguishers, hose and fire apparatus, electric light, power, welding

and heating apparatus, operating machines with their spare parts and attachments, gearing, dies, plating apparatus, pipe machines, patterns and flasks, trolleys and carriers and motors; core machines, arbors, lathes, planers, drill presses, railway tracks, ties, rails, frogs, and switches; cars and tramways; all equipment and appliances of a permanent character owned by the Defendant for use in the operation of said existing and future plants and factories, and the additions thereto and extensions thereof; it being expressly understood that any and all property covered by the foregoing description should be considered as fixtures and appurtenances constituting part of the real property of the Defendant.

Also all patents, trade-marks, trade names, trade designations, trade brands, trade processes, formulae, copyrights, and subjects of copyrights owned by the Defendant.

Also, all the rights, privileges, franchises and immunities of the Defendant, including the right to be a corporation, in so far as they could be lawfully transferred, and all of the good-will and the right to the name of the Defendant.

Also all of the rents, issues, income and profits of the described or referred to property.

Reserving however all cash, moneys and bills, and accounts receivable due to the Defendant or the Receiver herein, which are not to pass by said sale.

PETITIONER'S EXHIBIT 5.

IN THE DISTRICT COURT OF THE UNITED STATES,
IN AND FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

In the Matter of The Western Tool & Manufacturing Co., a corporation,	In Proceeding for the Reorganization of a Corporation. No. 9061.

MOTION OF OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS.

(Filed February 5, 1943.)

Now comes Owen N. Price and says that he is the duly constituted Trustee for bondholders under the Mortgage Deed of Trust, dated November 1, 1921, executed by said The Western Tool & Manufacturing Co., and recorded in Volume 133, page 17, *et seq.*, of Mortgage Records of Clark County, Ohio, (having been duly constituted and appointed such Trustee in succession to the original trustees named in said Mortgage Deed of Trust); that said Mortgage Deed of Trust secured the payment of an issue of bonds payable to bearer in an authorized amount of $100,000.00, of which only $90,000.00 were issued and of said last named amount there are now outstanding $73,400.00 in amount; all of which are now owned by the Bondholders' Protective Committee organized under an agreement of November 1, 1923, (under which agreement said bonds were more than fifteen years ago assigned and transferred to said Committee with full power to enforce all rights under said bonds,) except that $300.00 of said bonds were owned by persons unknown to the Committee, to the Company and to this Trustee, were not so deposited and transferred and have not been presented for payment of interest or otherwise heard of for more than twenty years; on account of which situation it has been adjudicated and determined in the suit pending in the Court of Common Pleas of Clark County, Ohio, for foreclosure of said Mortgage Deed of Trust, upon a plea by said Company, that said $300.00 of bonds were barred by the statute of limitations and that

there was no right to recover thereon or share on account thereof in the proceeds of the mortgaged property; that the debt due to said bondholders has been reduced to judgment in the case of *Owen N. Price, Trustee,* v. *The Western Tool & Manufacturing Co.,* No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942, in the sum of $134,698.21, to bear interest from that date at 8 per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942, by said Receiver in accordance with the order of said Common Pleas Court.

The Mortgage Deed of Trust above referred to is very voluminous, consisting of 55 pages, and no copy is filed herewith but the original will be submitted at the hearing hereof or earlier at the order of the Court.

This Trustee further says that he has not been served with any notice or copy of any order in this proceeding.

This Trustee now moves the Court to dismiss the Petition herein for the following reasons:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by the one secured creditor, to wit: the said Bondholders' Protective Committee.

Third: A prior proceeding is pending in which interests of parties will be best subserved.

Fourth: The Petition herein was not filed in good faith.

This Motion is to be supported by affidavits or by oral testimony, if so directed by the Court.

OWEN N. PRICE,
Owen N. Price,
Trustee as aforesaid.

KEIFER & KEIFER,
Keifer & Keifer,
Attorneys for said Trustee.

State of Illinois }
County of Cook } ss.

Owen N. Price, being first duly sworn, says that the statements in the foregoing Motion are true, as he verily believes.

OWEN N. PRICE.

Sworn to and subscribed before me this 20th day of January, 1943.

RUTH C. NETTLAND,
Notary Public.

PETITIONER'S EXHIBIT 6.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE
Attorneys and Counselors
Suite 1406 Conway Building
111 W. Washington St.
CHICAGO

May 22, 1941

Judge H. E. Oxford
Lakeland, Florida
Dear Sir:

I have yours of May 14 in regard to the Western Tool and Manufacturing Co. business and note with interest and satisfaction your explanation of your motive in writing in regard to this business.

I appreciate having somebody representing the old stock holders show a real interest in this business. This is the first manifestation we have had for a number of years—in fact, the representatives of the bond holders who own no stock have managed the business almost without assistance since the old manager, Henry Morris, died about 1930 or 1931. At that time business was at a very low state and instead of employing a new general manager,

we arranged with Mrs. Wheeler, who was Mr. Morris' secretary and office manager, to assume also the duties of the general manager without advance of salary and thus we cut expenses so that we could live through the lean years of the depression but we have had no financial assistance from any of the stock holders during all this period.

The result is that while we have an organization that can make money in a small way, we have not an organization which could be increased materially for the reason that we have not and do not know where we could get a competent general manager with the experience necessary to install new machinery and undertake new projects. Mrs. Wheeler, our present general manager, is handling the present business very well and is very dependable but the expanding of the business and taking new contracts for different articles than we have been accustomed to manufacture, I think, would be unwise and hazardous at the present time. As a matter of fact, the condition of the business and the necessity for the bond issue, which the Committee represents, grew out of doing that very thing during the World War. At that time they had what was regarded as a very competent and experienced Board of Directors and experienced general manager. Government contracts were taken and machinery was purchased and many new men employed but the taxes spread against profits, etc. drained the company, so that this bond issue was necessary to meet loans which they had made at the local banks in their expansion. As a result, the company has never gotten on its feet again and even if it succeeds in paying off the present bond issue, there will have to be additional money, personnel and talent put in the business to make it succeed.

Even the small amount of money we have been able to get ahead and are beginning to use now for the payment of interest, would go a very little way in financing the company for a program under which it could take large contracts and we of the Bond Holders Committee regard that as a hazardous program which we ought not to take in view of the indebtedness.

Accordingly, our right policy seems to be to expand the business just as much as we can in the things which we are manufacturing and which we have a reputation for. Our

small tools are having a very good demand and are largely going into the rearmament program for equiping factories, battle ships, etc. with small tools that they need. We would be glad to increase this business though if it increased very largely, we might have difficulty with the labor situation, though that is a chance we would be willing to take as some of the articles can be manufactured with comparatively unskilled labor, although our more important articles require labor which is highly skilled and with a long period of training to make them satisfactory.

We have wished for a long time to find somebody who wanted the factory and who would put in the necessary money to pay off the bond issue, even at a heavy discount, and then put necessary money in the factory and develop it but have not been able to locate such parties and think it unlikely that any party of this character will appear, even during this period. We have had the property at different times in the hands of local real estate agents at Springfield but they have never presented a good prospect to take over the property and accordingly we have carried it on as best we could with the resources which we had and taking care of the market which existed for our tools.

You may not get much encouragement out of this letter but at least you will understand the attitude of the present management. Personally, nothing would give me more satisfaction than turning the business back to the old stock holders if a reasonable settlement could be worked out with the bond holders. I am reaching an age when attending to business at Springfield is more or less a burden and we have all gotten more or less tired of the proposition but have had to stick to it, we thought, or lose heavily by closing down the business, as the good will is certainly quite valuable.

If either you or Mr. Hyde have any suggestions after reading this letter, I would be glad to hear them.

Very truly yours,

Enoch J. Price.

EJP:RN

PETITIONER'S EXHIBIT 7.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE

Attorneys and Counselors

Suite 1406 Conway Building

111 W. Washington St.

CHICAGO

June 26, 1941

Judge H. E. Oxford
Lakeland, Florida

Dear Sir:

Your letter of May 28 duly received and considered and I had intended to answer it sooner.

You suggest a possibility whereby you would satisfy the bondholders and reinstate the business in the hands of the stockholders and you ask what, in my opinion, it would cost to satisfy these bonds.

I have only the most indefinite idea but the situation on the bonds stands about this way. The company has picked up itself at a high discount about $13,000 face of the $90,000.00 issue, leaving about $77,000 outstanding, on which the unpaid interest will be about fifty per cent based on the plan of the Committee to reduce the unpaid interest rate to four per cent. That is to say, there would be say about a total of $115,000 all told due. I have only my own judgment on which to base a guess but in view of all the circumstances, I imagine that an offer to pay par for these bonds without interest would take practically all of them. It may be by careful handling enough could be bought below par to balance any cases where more than par had to be paid.

This estimate, as suggested, is only my own judgment. The ideas of bondholders since we have commenced paying interest again may be much different then I think but judging human nature, I would be surprised if par would not handle the whole issue.

I will be glad to keep in touch with you if you desire to work out a plan for taking these up as my files and knowl-

edge of addresses would be essential in any arrangement for picking up these bonds.

I might mention that there are some other parties who have looked over the plant and have a similar thought in mind to yours but whether they will make any concrete proposition or not, I do not know as yet.

Very truly yours,

ENOCH J. PRICE.

EJP:RN

PETITIONER'S EXHIBIT 8.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE

Attorneys and Counselors

Suite 1406 Conway Building

111 W. Washington St.

CHICAGO

Aug. 28, 1941

Mr. Harlan T. Hyde
310 E. Main St.
Lakeland, Fla.

My Dear Hyde:

A letter from Mrs. Wheeler reminds me that at the annual meeting of The Western Tool this spring we changed the by laws by reducing the no. of directors to five, Gurney, Kettering, Grim, Mrs. Wheeler and myself. As you haven't been able to attend for a couple of years we thought it best to have only directors who could be relied on to attend meetings.

Accordingly, if you were planning to attend the directors' meeting on Sept. 6th, you can cancel the date. I will write you after the meeting advising you of action taken and will be glad to hear from you as to any suggestions you may have as to the work of the factory or the handling

of the debt. You can write to my office or my home address below. Haven't begun going back to my office yet but will next week.

Very truly yours,

ENOCH J. PRICE,
2124 W. 112th St.,
Chicago, Ill.

PETITIONER'S EXHIBIT 9.

(Duplicate.)

(Letterhead of)

WINTERS, PRICE & STEVENS

Attorneys and Counselors

Suite 1053 Conway Building

111 W. Washington Street

CHICAGO

October 18, 1923.

CERTIFICATE OF BENEFICIAL OWNERSHIP
OF COMMON STOCK OF
THE WESTERN TOOL AND MANUFACTURING COMPANY

The undersigned hereby certify that James Gurney Jr. is the equitable or beneficial owner of 59 shares of the common stock of The Western Tool and Manufacturing Company, which have been assigned and transferred to the undersigned under a voting trust agreement dated July 20, 1923. The undersigned are the legal owners as trustees for said depositor of said shares, but said depositor or his assigns or legal representatives shall receive all dividends paid on said shares, but they shall have no right to vote said shares at any meeting of stockholders during the life of said trust agreement.

This certificate is transferable by assignment duly registered upon the books of said corporation.

.....
.....
.....
} *Trustees.*

ENOCH J. PRICE.

Chicago, Illinois, Oct. 19, 1923.

PETITIONER'S EXHIBIT 10.

CERTIFICATE OF BENEFICIAL OWNERSHIP
OF THE COMMON STOCK OF
THE WESTERN TOOL AND MANUFACTURING COMPANY

The undersigned hereby certifies that Edward S. Thomas is the equitable or beneficial owner of 443½ shares of the common stock of The Western Tool and Manufacturing Company which has been assigned and transferred to Charles S. Deneen, W. T. Kettering, W. D. Hollister and E. J. Price, as a Committee under a voting trust agreement dated July 20, 1923. The said Committee are the legal owners as trustees for said depositor of said shares, but said depositor or his assigns or legal representatives shall receive all dividends paid on said shares, but they shall have no right to vote said shares at any meeting of stockholders during the life of said trust agreement.

ENOCH J. PRICE,
Secretary of Committee.

Chicago, Illinois, April 26, 1928.

For value received I hereby sell, assign and transfer unto Harlan T. Hyde all my interest under the foregoing certificate in 443½ shares of the capital stock referred to by the within certificate and do hereby irrevocably constitute and appoint Enoch J. Price to transfer the said stock

on the books of the within named Committee with full power of substitution, in the premises.

EDWARD S. THOMAS.

Dated April 30, 1928.

Entered on books of Bondholders Committee May 2, 1928.

ENOCH J. PRICE, *Secy.*

PETITIONER'S EXHIBIT 11.

(Letterhead of)

THE WESTERN TOOL AND MANUFACTURING CO.

Manufacturers of

"CHAMPION" TOOLHOLDERS

Expanding Mandrels, Toolholder Steels,
Emery Wheel Dressers & Cutters
Shop Equipment, Vises, Etc.

SPRINGFIELD, OHIO, U.S.A.

March 14, 1941.

Mr. H. T. Hyde,
Lakeland, Florida.

Dear Harlan:—

Answering your favor of the 12th inst., you may not know that we are getting about all the Government orders we can handle with the equipment that we have, and the purchase of additional equipment is, I believe, out of the question at present. Prices are beyond reason for both new and used machinery. I do not really believe that a trip to Washington at this time by you and your attorney would benefit us much.

To make any item on a production basis would require new and up-to-date machinery. Our machinery, as you well know, is old and quite out of date, but I feel that we are doing quite well under the circumstances.

I have taken the liberty of referring your letter to Mr. Price, and you will hear from either him or me a little later on.

Sincerely,

THE WESTERN TOOL & MFG. CO.,
By ERNA H. WHEELER.

PETITIONER'S EXHIBIT 12.

(Letterhead of)

THE WESTERN TOOL AND MANUFACTURING CO.

March 17, 1941.

Mr. Harlan T. Hyde,
Lakeland, Florida.

Dear Harlan:—

The annual meeting of the stockholders and directors of the Western Tool & Mfg. Company will be held in the offices of the company at Springfield, Ohio, Friday Morning, March 28 at ten o'clock.

Inasmuch as nothing of importance will be brought up at the meeting, it will not be necessary for you to attend.

Yours cordially,

THE WESTERN TOOL & MFG. CO.,
E. H. WHEELER,
Gen'l Manager.

EHW/11

PETITIONER'S EXHIBIT 13.

(Letterhead of)
THE WESTERN TOOL AND MANUFACTURING CO.

Mr. H. T. Hyde, March 31, 1941.
Lakeland, Florida

Dear Harlan:—

Enclosed you will please find balance sheet as of March 31, 1941.

We had our annual meeting last Friday and only four were present: Mr. Price, Mr. Kettering, Mr. Grim and myself. Jim Gurney was unable to attend.

A resolution was adopted reducing the number of directors to five, and the following were named on the board: Mr. Price, Mr. Kettering, Mr. Grim, Jim Gurney and Erna Wheeler. This was done so that we would always be able to have a quorum present. Nothing of any importance was transacted. Mr. Price was re-elected president, W. T. Kettering- Vice-Pres., and E. H. Wheeler, Secy., Treas. & Mgr.

Business continues good, and we have about all that we can take care of.

Kind regards and best wishes—

Sincerely,

ERNA H. WHEELER

PETITIONER'S EXHIBIT 14.

(Letterhead of)
THE WESTERN TOOL AND MANUFACTURING CO.

Mr. Harlan T. Hyde, May 13, 1942.
Lakeland, Florida.

Dear Harlan:—

Enclosed you will please find balance sheets for the last two months. Please pardon the oversight; it will not happen again.

We had a meeting the last Saturday in March, and I have just discovered that a notice of same was not mailed to you. I guess it does not matter much, however, for I am always requested to tell you that it will not be necessary for you to make the trip North.

There were only four of the five directors present; Jim Gurney was unable to attend. Nothing of any importance transpired.

We are extremely busy here and everything seems to be moving along very nicely.

Kind regards and best wishes—

Sincerely—

ERNA H. WHEELER

PETITIONER'S EXHIBIT 15.

The Western Tool & Manufacturing Co.
Springfield, Ohio.

The undersigned shareholders, being the owners and holders of a majority of the outstanding shares of THE WESTERN TOOL & MANUFACTURING CO., hereby demand that you forthwith file a petition under and pursuant to the provisions of Chapter X of the Acts of Congress relating to Bankruptcy for the relief of your corporation and for a stay of the pending proceedings against you in the Court of Common Pleas of Clark County Ohio, designated as Owen N. Price, Plaintiff, vs. The Western Tool & Manufacturing Co., a corporation, defendant, and designated as No. 36421.

Upon your failure to advise either of our attorneys, viz: Mr. George R. Murray, Callahan Bank Building, Dayton, Ohio and Charles W. Stiefel, Jr., 30 N. LaSalle St. Chicago, Illinois, within three (3) days from date hereof of your willingness to forthwith file such proceeding, the under-

signed will take such steps as they deem to be necessary and advisable for the institution of such proceeding.

HARLAN T. HYDE
JAMES GURNEY (also known as JAMES GURNEY, JR.)
STELLA GURNEY
JAMES G. GURNEY
By: JAMES G. GURNEY,
Attorney in Fact.

Jan. 6, 1943 10:35 Mrs. Wheeler — Wm. T. Kettering Present

PETITIONER'S EXHIBIT 16.

VOTING TRUST AGREEMENT

THE WESTERN TOOL AND MANUFACTURING COMPANY.

THIS AGREEMENT, entered into as of the 20th day of July, 1923, between Henry Morris, James G. Gurney and Edward S. Thomas, of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of The Western Tool & Manufacturing Co., and said parties of the second part are members of the bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present, provided it is enabled to control, the policy of said company pending the payment of such refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said The Western Tool & Mfg. Co., as follows:

Henry Morris	shares 87.50
Edward S. Thomas	443 ½
James G. Gurney, JR.	75
Total,	606.00

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payment in full of the refunding bond issue to be arranged for by said committee with full and exclusive right to vote the same at all stockholders meetings of said corporation while so held, as such trustees or a majority of them shall determine. Said Trustees or any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of said shares, respectively, or to their assigns or legal representatives; said Trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively may be sold or assigned, and, if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor, which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bondholders committee should fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case any one or more of said second parties should resign, die or refuse to act, the remaining members shall

have full power in all respects to act for all in voting said stock and re-delivering it to the proper parties.

Witness our hands and seals the day and year above written.

Witness E. C. TREMAYNE EDWARD S. THOMAS

.....

.....

.....

Bondholders Com. ENOCH J. PRICE, *Secy.*

.....

.....

.....

PETITIONER'S EXHIBIT 17.

VOTING TRUST AGREEMENT.

THE WESTERN TOOL AND MANUFACTURING COMPANY

This agreement, entered into as of the 20th day of July, 1923, between Henry Morris, James Gurney, Jr. and O. H. Hyde, of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of The Western Tool & Manufacturing Co., and said parties of the second part are members of a bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present provided it is enabled to control the policy of said company pending the payment of said refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said The Western Tool & Mfg. Co., as follows:

Henry Morris	shares	87.50
O. H. Hyde	"	440
James Gurney, Jr.	"	75
Total		602.50

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payment in full of the refunding bond issue to be arranged for by said committee with full and exclusive right to vote the same at all stockholders' meetings of said corporation, while so held, as such trustees or a majority of them shall determine. Said Trustees or any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of the said shares, respectively, or to their assigns or legal representatives; said trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively may be sold or assigned, and, if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bondholders committee should fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case any one or more of said second parties should resign, die or refuse to act, the remaining members shall have full power in all respects to act for all in voting said stock and redelivering it to the proper parties.

Witness our hands and seals the day and year above written.

JAMES GUENET, JR.

PETITIONER'S EXHIBIT 18.

BONDHOLDERS' PROTECTIVE AGREEMENT.

THE WESTERN TOOL & MANUFACTURING COMPANY

Dated November 1, 1923.

THIS AGREEMENT, made and entered into as of the 1st day of November, 1923, by and between Charles S. Deneen, W. T. Kettering, Edward I. Bloom, and E. J. Price, all of Chicago, Illinois, and W. D. Hollister, of the City of Delavan, State of Wisconsin, and their and each of their successors (sometimes hereinafter called the "Committee," which shall include whomsoever may compose the Committee from time to time), parties of the first part, Central Trust Company of Illinois, of Chicago, Illinois (hereinafter called the "Depositary"), party of the second part, the several holders of the outstanding First Mortgage Serial Eight Per Cent Gold Bonds, dated November 1, 1921, issued by the Western Tool & Manufacturing Company (hereinafter called the "Company"), a corporation organized and existing under the laws of the State of Ohio, who shall execute this agreement, or who shall deposit their bonds hereunder (hereinafter called the "Depositors"), parties of the third part.

• • • • • • • • • • •

The Depositors who unite in this Agreement by depositing their respective bonds and coupons as aforesaid, hereby severally and respectively assign and transfer to the Committee, the said bonds and coupons so deposited for the purpose of enabling the Committee to carry out this Agreement.

* * * * * * * * * *

Upon the deposit of any bonds with the coupons thereto belonging and upon the issuance of a certificate therefor by the Depositary, the Committee shall be considered to be the owner thereof, in law and in equity, and of all right, title and interest of the original depositor therein, and neither the Committee nor the Depositary shall be affected by any notice to the contrary.

* * * * * * * * * *

FOURTH.

Powers of the Committee.

The Committee is hereby expressly authorized and empowered to exercise, in its discretion, all such rights and powers, and to take all such measures and to do all such acts as the Committee may deem necessary or proper in the interest of and to protect the Depositors and to promote and carry out the purposes of this Agreement, although any such rights, powers, measures or acts may not be expressly conferred or authorized by the terms hereof, as fully and effectually as if the same were herein distinctly specified; and as often as and for any cause or reason that it may deem expedient, to protect the interests of the depositors hereunder. The methods to be adopted in carrying out this Agreement are to be solely within the discretion of the Committee.

The Committee shall be, and hereby is, vested, under and by virtue of this Agreement, as the Trustee of an express trust, with legal title to all of the bonds and coupons which may be deposited hereunder, and with all rights of action on or with respect thereto or on or with respect to any guaranty or other collateral undertaking in relation to such bonds and coupons; and the depositors hereby severally and respectively assign and transfer the same to the Committee. The Committee is also hereby vested

with full and absolute power and authority, in its own name or otherwise, to take, or cause to be taken, such steps, proceedings and actions, and to exercise such rights and privileges, as owner or holder of the deposited bonds and coupons, or otherwise, as it may, from time to time, in its sole discretion, deem proper, necessary or advisable, for the purpose of consummating this Agreement, or for the purpose of protecting, preserving, securing or enforcing the rights and interests of the holders of the bonds and coupons deposited hereunder, severally and collectively; and, to that end and for that purpose, the Committee is hereby authorized and empowered, as it, in its sole discretion, may deem expedient, necessary or proper, to institute, maintain and prosecute all suits and proceedings at law and in equity, and to discontinue, dismiss, control and compromise any and all suits and proceedings, at law or in equity, no matter by whom the same may be instituted.

Without limiting or modifying in anywise, the rights, powers and authority vested in the Committee, in and by this Agreement, it is hereby expressly declared and agreed that the Committee shall be and hereby is absolutely and irrevocably authorized and empowered to do, or cause to be done, the following things, or any one, or more of them, as and when, and in such way and manner as the Committee in its sole discretion may deem proper, necessary or advisable, to-wit:

• • • • • • • • • • •

(6) To waive or enforce any default under the provision of said trust indenture; to consent to any modification of the provisions of said trust indenture; to consent to the release or sale of any property subject thereto and the application of the proceeds thereof.

• • • • • • • • • • •

(13) To enter into and carry out such agreements as the Committee in its discretion may deem advisable in respect of the bonds, the floating and other indebtedness of the Company, and the payment, refunding, conversion or adjustment thereof.

• • • • • • • • • • •

(18) The said Committee is hereby given full power to arrange for the refunding of said bond issue at a lower rate of interest, not less than six and one-half (6½) per

cent per annum, and with maturities not later than those suggested in the following schedule:

$ 5,000	November 1, 1925
5,000	" 1, 1926
5,000	" 1, 1927
5,000	" 1, 1928
5,000	" 1, 1929
10,000	" 1, 1930
10,000	" 1, 1931
10,000	" 1, 1932
10,000	" 1, 1933
10,000	" 1, 1934
25,000	" 1, 1935

such refunding issue of bonds to be in similar denominations to the present, dated May 1, 1923, and to be secured by a Trust Indenture to such Trustee, as the Committee may arrange for, and having such terms and provisions as the Committee may prescribe for the security and enforcement of said bond issue.

(a) Such refunding bonds, if issued, shall be exchanged for the present bonds which may be deposited under this Agreement in such a manner that the maturities of the new bonds held by each bondholders will have the same relation to the whole issue as the bonds held at present by such bondholder, but the Committee's decision in making such exchange shall be final and binding on all parties.

(b) In making a refunding issue of bonds the Company may exclude such of the real estate as is not needed by the Company, in the judgment of the Committee, provided that in case of sale the proceeds of such excluded real estate shall be applied as the Committee may decide.

(c) Also if said Committee approves, the provisions in the present Trust Indenture for the carrying of Life Insurance for the benefit of the bondholders may be entirely eliminated, provided that the cash surrender value received on cancelling the present insurance shall be applied on principal or interest of said bond issue when received.

• • • • • • • • • •

EIGHTH.

The Committee and the Depositary May Be Interested in the Property and in Contracts Concerning the Same.

Any member of the Committee, or any firm or corporation of which he may be a member, director or officer, and the Depositary, and its directors, officers and agents, may be or become pecuniarily interested in any securities, property, matters or things which are or may become the subject of this Agreement, or be issued hereunder, or in any syndicate or contract with the Committee which may be effected or entered into for the purpose of carrying out this Agreement.

• • •

PETITIONER'S EXHIBIT 19.

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

BALANCE SHEET
as at December 31st, 1942

ASSETS

Current Assets		
Cash in Banks	$ 25,654.36	
Accounts Receivable, Customers	11,249.32	
Inventories		
Raw Material	21,072.81	
Finished Goods and Work in Process	12,396.53	
Total Current Assets		$ 70,373.02
Fixed Assets		
Land	$ 5,000.00	
Buildings	29,476.86	
Machinery	10,527.71	
Dies	583.74	

Jigs and Fixtures	482.96	
Belting and Pulleys	664.48	
Patterns	992.02	
Office Fixtures	283.56	
Total Fixed Assets	$ 48,011.33	
Less: Reserves for Depreciation	2,032.08	
Net Fixed Assets		45,979.25
Other Assets		
U. S. Tax Savings Notes (plus accrued interest)	$ 20,128.00	
Treasury Stock (2 Shares Western Tool & Manufacturing Co.)	200.00	
Total Other Assets		20,328.00
Deferred Charges		3,934.85
Total Assets		$140,615.12

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

BALANCE SHEET
as at December 31st, 1942

LIABILITIES AND CAPITAL

Current Liabilities		
Accounts Payable		$ 1,275.94
Liability to Bondholders Trustee		
(Judgment dated December 8th, 1942)		128,055.19
Reserve for Federal Income and Excess Profits tax, for year 1942		62,892.07
Capital and Surplus		
Capital Stock		
Common Stock		
Authorized 1500 shares, par value $100.00 per share.	$150,000.00	
Less: Unissued 379½ shares	37,950.00	
Issued and outstanding	$112,050.00	

Preferred Stock		
Authorized 500 shares par value $100.00 per share	$ 50,000.00	
Less: Unissued, 500 shares	50,000.00	
Issued and outstanding		
Surplus—*Deficit*	163,658.08	
Total Capital & Surplus—*Deficit*		51,608.08
Total Liabilities and Capital		$140,615.12

PETITIONER'S EXHIBIT 20.

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

STATEMENT OF PROFIT AND LOSS
For Year Ended December 31, 1942

		Amount	*% to Sales*
Sales	$	$195,466.78	100.00
Cost of Sales			
Inventory January 1st, 1942	13,960.53		
Purchases	21,756.97		
Wages	67,935.21		
	103,652.71		
Less: Inventory December 31st, 1942, Raw material, Finished Goods, Work in Process	33,469.34		
Cost of Sales		70,183.37	35.91
Gross Profit		125,283.41	64.09

Manufacturing Expenses			
Shop Supplies	$ 9,956.40		
Fuel and Power	2,463.50		
Repairs to Buildings—Equipment	5,597.75		
Machinery Rental	491.30		
Insurance	1,171.25		
Social Security Tax	1,718.43		
Freight	991.79		
Taxes, Real Estate & Personal Property	563.53		
Depreciation Buildings and Machinery	2,009.02		
Total Manufacturing Expenses	$ 24,962.97		12.77
Selling, General and Administrative Expense			
Salaries	$ 2,115.00		
Receivers Fee	2,880.00		
Legal Fees, including Trustee fee	4,400.93		
Advertising	661.00		
Sales Commissions	1,234.83		
Traveling Expense	223.75		
Telephone—Telegraph	191.48		
Postage and Shipping	510.17		
Taxes, Federal & State Capital Stock	650.00		
Taxes, 1941 Federal Income & Excess Profits	1,594.10		
Accounting & Directors Fees	305.00		
Watch Service	455.80		
Employees Merit Award & Bonuses	410.00		
General, Miscellaneous Expenses	485.32		
Depreciation, Office Fixtures	23.06		
Printing, Stationery & Office Supplies	250.50		
Total Selling, Gen. & Admn. Expense	$ 16,390.94		8.39
Total Mfg., Selling, Gen. & Admn. Exp.		41,353.91	21.16
Profit from Operations (forward)		$ 83,929.50	42.93

(Page 2)

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

STATEMENT OF PROFIT AND LOSS
For Year Ended December 31, 1942

	Amount		% to Sales
Profits from Operations (brought forward)		$ 83,929.50	42.93
Other Income			
Rents received	2,087.50		
Commission on candy machine	24.57		
Bank Interest	161.96		
Premium on Sale of Liberty Bond	52.51		
Total Other Income		2,326.54	1.19
		86,256.04	44.12
Other Expense			
Interest on company bonded indebtedness January 1 to December 8, 1942	$ 5,479.49		
Interest on judgment liability December 8th to December 31, 1942	666.98		
Interest and Discount, Net	1,494.48		
Total Other Expense		7,640.95	3.91
Net Profit for year ended December 31st, 1942 (before provision for Federal income and excess profits tax for year 1942)		$ 78,615.09	40.21
Deduct: Federal income and excess profits tax for year 1942 (estimated)		62,892.07	32.17
Net Profit after Federal income and excess profits tax		$ 15,723.02	8.04

PETITIONER'S EXHIBIT 21.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee, *Plaintiff*,
vs.
The Western Tool & Manufacturing Company, *Defendant*.
No. 36421

INVENTORY AND APPRAISEMENT

of Assets and Property of

THE WESTERN TOOL & MANUFACTURING COMPANY,

as of July 15, 1942.

RECAPITULATION

	Appraised Value
Total—Machinery, Equipment, etc. (p. 7)	$15,402.72
Total—Materials (p. 17)	28,792.63
Total—Real Estate (p. 18)	37,585.00
Total Appraisement	$81,780.35

ORDER.

(Filed July 17, 1943)

This day this cause came on to be heard on the motion heretofore, to-wit, on February 5, 1943, filed by and on behalf of the Bondholders' Protective Committee, to dismiss the petition herein.

Upon consideration whereof and after hearing the arguments of counsel and being fully advised in the premises, the court finds that said motion is well taken and that it should be sustained.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the motion above referred to be, and hereby the same is, sustained;

IT IS FURTHER BY THE COURT ORDERED, ADJUDGED AND DECREED that the petition filed in this cause on January 11, 1943, and these proceedings be, and hereby the same are, dismissed at the costs of James G. Gurney and his associates.

To all of which findings, rulings, orders, judgments and decrees of the court, James G. Gurney and his associates, by their counsel, all and each, jointly and severally, except.

NEVIN
United States District Judge.

DECISION.

(Filed July 17, 1943)

NEVIN, *District Judge*:

On January 11, 1943, a petition was filed in this Court entitled In the Matter of The Western Tool & Manufacturing Company, a corporation, Debtor.

The following allegations appear at the outset of the petition, to-wit: "Your petitioner, The Western Tool & Manufacturing Co., respectfully represents:

1. Petitioner is a corporation organized and existing under the laws of the State of Ohio and is a corporation which could become a bankrupt under the Acts of Congress relating to bankruptcy and is not a municipal, insurance or banking corporation or a building and loan association or a railroad corporation.

2. Your petitioner now has and for the last six months preceding the filing of this petition has had its principal office and place of business at Springfield, Ohio, within the territorial jurisdiction of this Court.

3. The nature of the business of the petitioner is the ownership and operation of a factory for the manufacture of tools, which factory is located in Springfield, Ohio.

4. Petitioner was incorporated in the year 1904 under the name of the Western Manufacturing Company, which name was subsequently changed to The Western Tool & Manufacturing Co."

Immediately after the foregoing averments further allegations are set forth, among others the following:

"13. Adequate relief cannot be obtained under the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy for the reasons, among others, that the principal indebtedness of petitioner is secured as aforesaid.

14. Petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

15. No other petition by or against petitioner is pending under Chapter X of this Act, nor is any other bankruptcy proceeding by or against petitioner now pending."

Thereafter, the petition states that:

"WHEREFORE petitioner prays:

A. That an order be entered approving this petition.

B. That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act and your petitioner may have such other and further relief as is necessary."

To the petition, there is attached an affidavit of James G. Gurney. It is recited in the affidavit that James G. Gurney "is the owner of seven (7) shares of the One Hundred ($100.00) Dollar par value common stock of The Western Tool & Manufacturing Co., and that he is the agent and attorney-in-fact and holds the proxy of Harlan T. Hyde, James Gurney (also known as James Gurney, Jr.) and Stella K. Gurney and as such agent and attorney-in-fact has full power and authority to do all things which

the aforesaid principals might or could do in the protection and advancement of their interest as shareholders of said corporation," and "that Stella K. Gurney is the owner and holder of sixty-six like shares of said corporation; that James Gurney (also known as James Gurney, Jr.,) is the owner and holder of fifty-nine (59) like shares of said corporation and that Harlan T. Hyde is the owner and holder of five hundred fifty and three-fourths (550¾) like shares of said corporation; that the duly issued and outstanding shares of said corporation are one thousand one hundred twenty and one-half (1120½) common shares."

There is also attached to the petition, a document marked "Exhibit A" entitled "Voting Trust Agreement, The Western Tool & Manufacturing Co."

The petition is signed "The Western Tool and Manufacturing Co., by James G. Gurney."

On January 12, 1943, Mr. George R. Murray, a member of the bar of this Court, appeared before the court and stated (as appears of record in the transcript filed in this case) that along with counsel located in Chicago, Illinois, he represented Mr. James G. Gurney and his associates. Mr. Murray further stated that he had filed the petition above referred to for the reorganization of The Western Tool & Manufacturing Company, under Chapter 10, of the Bankruptcy Act. As the record shows, an *ex parte* hearing was held on January 12, 1943.

While it appears on the face of the petition that the petitioner is The Western Tool & Manufacturing Company, it developed from Mr. Murray's statements that the corporation as such had taken no action authorizing the filing of the petition. That it had in fact previously ignored a demand made by Mr. Gurney and his associate stockholders that the corporation "forthwith file a petition under and pursuant to the provisions of Chapter 10, of the Act of Congress relating to Bankruptcy, for the relief of your corporation and for a stay of the pending proceedings against you in the Court of Common Pleas of Clark County, Ohio, designated as Owen N. Price, Plaintiff, *vs.* The Western Tool & Manufacturing Company, a corporation, Defendant, and designated as No. 36421."

In signing the petition, Mr. Gurney recites no official capacity with the corporation. He claims only to act for himself and associate stockholders, whom it is asserted (Rec. P. 9, and affidavit of Mr. Gurney) own a majority of the stock.

As appears of record, the court, at the *ex parte* hearing on January 12, 1943, questioned counsel as to the right of Mr. Gurney to file the petition herein. Mr. Murray responded that under the circumstances claimed here to exist, it was not necessary that the corporation as such, take any action preliminarily to the filing of the petition because (Rec. Pp. 9-12) "we are appealing to the equitable side of this court at this time."

At the conclusion of the *ex parte* hearing, and based upon the statements of counsel then made (Rec. Pp. 31-32) the court permitted the petition to remain on file with the understanding (as shown by the record) that any proper party might, if it was so desired, later raise the question as to the right of James G. Gurney and his associates to file the petition under the Bankruptcy Act in the first instance; whether or not the petition was filed in good faith, or any other pertinent questions.

At the conclusion of the *ex parte* hearing on January 12, 1943, an Order was entered, approving the petition as filed in good faith; enjoining certain named parties from further proceedings and continuing the cause for further hearing until February 19, 1943.

On February 19, 1943, (as appears of record) a further hearing was held, at which counsel representing various interested parties and also counsel for James G. Gurney and his associates appeared. At this hearing, counsel for the parties other than James G. Gurney and his associates, challenged the right of James G. Gurney to file the petition in the first instance, and raised the question of good faith, as well as presenting other issues.

In the meantime, to-wit on February 5, 1943, a document had been filed entitled "Motion of the Bondholders' Protective Committee" which reads in part as follows: "Now come Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering and say they are a duly constituted Committee under a Bondholders' Protective Agreement of November 1, 1923, * * * and as such Committee now

move "the Court to dismiss the Petition herein for the following reasons, to wit:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by one secured creditor, to-wit: this Bondholders' Protective Committee.

Third: The petition herein was not filed in good faith, but was filed by said James G. Gurney, the owner of only three shares of stock, without authority or legal right in pursuance of his attempt to dictate the policy and management of said corporation for his own personal advantage and to delay or defeat the corporation's effort to pay its bonded indebtedness."

On the same day, to-wit, February 5, 1943, a document was filed entitled "Motion of Owen N. Price, Trustee for Bondholders." In his motion, Owen N. Price says among other things "that he is the duly constituted Trustee for bondholders under the Mortgage Deed of Trust, dated November 1, 1921, executed by said The Western Tool & Manufacturing Company," and he moves the court to dismiss the petition upon the same grounds and for the same reasons as set forth in the motion of the Bondholders' Protective Committee.

While the court stated (record pages 32, 40-42) that the purpose and effect of the Order entered on January 12, 1943, at the conclusion of the *ex parte* hearing was to keep all matters and proceedings in their then status until there was "an opportunity for everybody to be heard at the proper time" and at the hearing on February 19, 1943, "that all the questions should be heard that are necessary, just as if you were here initially," nevertheless, the court has concluded to consider and dispose of

the matters before it as upon the motion above referred to, of the Bondholders' Protective Committee—the motion of Owen N. Price, as indicated, being to the same effect.

Briefs have been filed on behalf of the respective parties. It is stated by counsel for James G. Gurney and his associates (R. Br. P. 2) that "the theory of the petition in this cause is that these shareholders may appear in the right of the corporation," and that they are, as heretofore stated, "appealing to the equitable side of this court." (Rec. P. 12) They further submit (R. Br. P. 1) that "the right of shareholders to act on behalf of the corporation, under such circumstances, (as here) is established by the case * * * of *Hawes* v. *Oakland*, 104 U. S. 450."

In view of the statements and observations made by the court (as appear of record) at both of the hearings, the court deems it unnecessary to here go into further detail.

Upon a consideration of the facts as disclosed by the record in the instant case, the court is of opinion that James G. Gurney and his associates do not bring themselves within the rule laid down in the *Hawes* case, *supra*.

Upon a consideration of the whole of the record, the briefs and arguments of counsel, and the applicable law, the court is of opinion and so finds that the motion hereinbefore referred to of the Bondholders' Protective Committee is well taken and that it should be, and it is, sustained. *Bryan* v. *Welch*, 74 F. (2d) 964, (C.C.A. 10); *In re*: *Piccadilly Realty Co.*, 78 F. (2d) 257, (C.C.A. 7); *In re*: *Pittsburgh Terminal Coal Corp.*, 30 F. Supp. 106, (affirmed 109 F. (2d) 1020, C.C.A.3.)

The Court has prepared and filed an order in accordance with its findings and ruling herein.

In accordance with a suggestion theretofore made (Rec. P. 40) a motion was filed on March 15, 1943, by and on behalf of James G. Gurney and his associates in which the Court is asked "to strike out of the affidavit of Enoch J. Price, heretofore filed herein, the Fifth paragraph on pages one and two, the Sixth paragraph on page two, the Seventh paragraph on page two, the Ninth paragraph on page three and all of the remaining paragraphs contained in said affidavit and also that portion of Exhibit C en-

titled 'Complaint in Equity' without striking out Exhibit A attached thereto and designated 'Voting Trust Agreement'."

The Court has heretofore entered an order sustaining the motion just referred to of James G. Gurney and his associates and in arriving at its decision and conclusion on the Motion of the Bondholders' Protective Committee, has not considered those portions of the affidavit of Enoch J. Price which were ordered stricken out.

NEVIN J.

Appearances:

George R. Murray, Esq., Dayton, Ohio.
Charles W. Stiefel, Jr., Esq., Chicago, Ill.,
Attorneys for James G. Gurney, Petitioner.

William H. Griffith, Esq., Springfield, Ohio.
Attorney for The Western Tool and Manufacturing Company.

William W. Keifer, Esq., and
Horace S. Keifer, Esq., of
Keifer & Keifer, Springfield, Ohio,
Attorneys for Owen N. Price, Trustee for Mortgage Bondholders and Bondholders' Protective Committee, The Western Tool and Manufacturing Company.

ENTRY OF ORDER DISSOLVING INJUNCTION.

(Filed August 11, 1943)

It appearing that an Order of Injunction was made and entered in this matter on January 12, 1943, against various parties by name and by groups, and that pursuant to the order of this Court of July 17, 1943, dismiss-

ing the Petition herein said injunction should be dissolved, if such has not already been the result of the order of said dismissal, it is now by the Court expressly ordered that said injunction heretofore granted on January 12, 1943, restraining Owen N. Price, as Trustee, and others from certain actions in connection with The Western Tool & Manufacturing Company be and the same is dissolved. To which order of the Court James G. Gurney and others on whose behalf the Petition herein was filed by their counsel except.

NEVIN
U. S. District Judge.

Approved:
KEIFER & KEIFER
Attys. for Owen N. Price
Trustee and others

See Letters from Keifer & Keifer dated Aug. 10 & Aug. 7 and Letter from Judge Nevin to Keifer & Keifer dated Aug. 9th, 1943 *re* signature of counsel for James G. Gurney, *et al.* on this entry.

NOTICE OF APPEAL.

(Filed August 11, 1943)

Notice is hereby given that the Western Tool & Manufacturing Company, a corporation, and Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., Stella Gurney and James G. Gurney, individually and being the owners of more than the majority of the outstanding shares of The Western Tool & Manufacturing Company, debtor above named, hereby appeal to the Circuit Court of Appeals for the 6th Circuit from the order dismissing the petition and the final judgment entered in this action on the 17th day of July, 1943 and from the order dis-

solving the injunction entered in this action on the 11th day of August, 1943.

CHAS. W. STIEFEL JR.
30 North LaSalle Street
Chicago, Illinois

GEO. R. MURRAY
1103-1106 Callahan Building
Dayton, Ohio

Attorneys for the Appellants, The Western Tool & Manufacturing Company and Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., Stella Gurney and James G. Gurney.

ORDER.

(Filed August 11, 1943)

The time within which the record on appeal must be filed is hereby extended to seventy-five days from the date of the filing of the notice of appeal herein.

Approved:

NEVIN
Judge

Consented to by W. W. Keifer, Atty
by telephone Aug. 11, 1943
GEO. R. MURRAY

CHAS. W. STIEFEL
GEO. R. MURRAY
Attys for Appellants.

BOND ON WRIT OF ERROR OR APPEAL.

(Filed August 11, 1943)

Bond No. 93935

KNOW ALL MEN BY THESE PRESENTS

That we, James G. Gurney, as principal and The Western Casualty and Surety Company, a Kansas Corporation as sureties, are held and firmly bound unto Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering as a committee under a Bondholders Protective Agreement of Nov. 1, 1923 and Owen N. Price as Trustee for Bondholders under Mortgage Deed of Trust dated Nov. 1, 1921 in the full and just sum of Two Hundred Fifty Dollars, to be paid to the said Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering as a committee under a Bondholders Protective Agreement of Nov. 1, 1923 and Owen N. Price as Trustee for Bondholders under Mortgage Deed of Trust dated Nov. 1, 1921 certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this ninth day of August in the year of our Lord one thousand nine hundred and forty-three.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a proceedings depending in said Court for the re-organization under Chapter X of the Bankruptcy Act, of The Western Tool and Manufacturing Co. which proceeding was instituted by James G. Gurney, individually and on behalf of other shareholders in behalf of said corporation an order was entered against the said Petitioner dismissing said Petition and Proceeding on July 17, 1943, and the said Petitioner, The Western Tool and Manufacturing Co. having filed its Notice of Appeal in the Clerk's Office of the said Court to reverse the said order in the aforesaid suit, and citing and admonishing Appellees to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the fifth day of October, 1943 next.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that, if the said James G. Gurney on behalf of The Western Tool and Manufacturing Co. shall prosecute his appeal to effect, and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....

JAMES G. GURNEY,
Individually and on Behalf of
The Western Tool and Manufacturing Co.

The Western Casualty and Surety Company
By: PETER S. PEDERSEN,
Peter S. Pedersen,
Attorney-in-Fact.

Approved by:

NEVIN,
United States District Judge,
Southern District of Ohio.

POWER OF ATTORNEY

THE WESTERN CASUALTY AND SURETY COMPANY
Home Office—Fort Scott, Kansas

KNOW ALL MEN BY THESE PRESENTS: that The Western Casualty and Surety Company, of Fort Scott, Kansas, a corporation of the State of Kansas, having its principal office in the city of Fort Scott, Kansas, pursuant to the following By-Law, which was adopted by the Board of Directors of the said Company on March 22nd, 1929, to-wit:

"Article IV, Section 5.—The President, or the Secretary-Treasurer, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries, and Attorneys-in-fact and to authorize them to execute on behalf of the Company and attach the seal of the Company thereto, bonds, and undertakings, recognizances, contracts

of indemnity and other writings obligatory to the nature thereof''
does hereby nominate, constitute and appoint Peter S. Pedersen, of the City of Chicago, State of Illinois, its true and lawful agent(s)-in-fact, and attorney(s)-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed: Any and all bonds and undertakings.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Fort Scott, State of Kansas, in their own proper persons.

All authority hereby conferred shall expire and terminate without notice one year from date of issue.

In Witness Whereof, Ray B. Duboc, President has hereunto subscribed his name and affixed the corporate seal of the said The Western Casualty and Surety Company, of Fort Scott, Kansas, this 12th day of June, 1943.

The Western Casualty and Surety Company

(Seal) By Ray B. Duboc,
President.

State of Kansas }
County of Bourbon } ss.

On this 12th day of June, A. D., 1943, before the subscriber, a Notary Public of the State of Kansas in and for the County of Bourbon, duly commissioned and qualified, came Ray B. Duboc, President of The Western Casualty and Surety Company, of Fort Scott, Kansas, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and, being by me duly sworn, deposeth and saith, that he is the officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said Company, and the said corporate seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Company, and that By-Law, Article IV, Section 5, adopted by the Board

of Directors of said Company, referred to in the preceding instrument, is now in force.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Fort Scott, the day and year first above written.

(Seal)

My Commission expires July 21st, 1945.

E. A. SHAVER,
Notary Public.

I, F. W. Duboc, Assistant Secretary of The Western Casualty and Surety Company, do hereby certify that the above and foregoing is a true and correct copy of the original Power of Attorney given by said Company to Peter S. Pedersen, of Chicago, Illinois, authorizing him to execute bonds as therein set forth, and do hereby further certify that the said Power of Attorney has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of said Company at Fort Scott, Kansas, this 9th day of August, 1943.

F. W. DUBOC,
Assistant Secretary.

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

(Filed Sept. 3, 1943)

And now comes the Western Tool & Manufacturing Company, a corporation, and James G. Gurney, individually and on behalf of other shareholders of said corporation, in behalf of said corporation, petitioners-appellants, and designates the following portions of the record, proceedings and the evidence to be contained in the record on appeal, viz:

1. Petition of Western Tool & Manufacturing Company for reorganization, filed January 11, 1943, together with affidavit of James G. Gurney attached thereto and exhibit attached thereto.

2. Injunctional order entered January 12, 1943.

3. Motion of the Bondholders' Protective Committee filed February 5, 1943, to dismiss the petition.

4. Condensed Statement in Narrative Form filed herewith, of testimony of witnesses heard in hearing held February 19, 1943, before the honorable Robert R. Nevin.

5. Exhibits made a part of the transcript of testimony and included and attached to the Condensed Statement in Narrative Form, of testimony, filed herewith.

6. The following exhibits in their respective original form:

Petitioners' Exhibits 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 (excluding balance sheets), 15, 16, 17, 19, 20.

7. The following excerpts from the following Exhibits:

A. From petitioners' Exhibit 1:

(a) The heading.

(b) Paragraphs 1 and 2 on page 1 thereof.

(c) Paragraphs 7 and 8 on page 7 thereof.

(d) Paragraphs 12 and 13 on page 9 thereof.

(e) The words "Wherefore, the Plaintiff prays" and paragraph 16 (e) on page 10 thereof.

(f) Paragraph 16 (e) on page 11 thereof.

B. From petitioners' Exhibit 4:

(a) The heading.

(b) Page 2 thereof.

(c) All but the last paragraph of page 3 thereof.

C. From petitioners' Exhibit 18:

(a) The heading and first paragraph on page 1 thereof.

(b) The heading "Fourth—Powers of Committee" and the last paragraph, all appearing on page 7 thereof.

(c) All of page 8 thereof.

(d) The first eleven lines on page 9 thereof.

(e) Paragraph (6) on page 10 thereof.

(f) Paragraph (13) on page 12 thereof.

(g) Paragraph (18), (18) (a), (b) and (c) appearing on pages 13 and 14 thereof.

(h) Paragraph Eighth appearing on page 16 thereof.

D. From petitioners' Exhibit 21:

(a) The title page, being the first page thereof and unnumbered.

(b) The heading "Recapitulation" and the four items appearing under such recapitulation, together with the values of each, all appearing on page 19 thereof.

8. Order entered by Judge Robert R. Nevin July 17, 1943 dismissing the petition and proceedings.

9. Decision of Judge Robert R. Nevin filed July 17, 1943 in connection with such order dismissing proceedings.

10. Order of Judge Robert R. Nevin entered August 11, 1943 dissolving injunction (excluding correspondence attached thereto).

11. Notice of appeal filed August 11, 1943.

12. Order of Judge Robert R. Nevin entered August 11, 1943 extending time to file record on appeal.

13. Bond for costs.

14. Designation of contents of record.

15. Statement of points relied on.

16. Clerk's certificate to the record.

Dated: August 30, 1943.

George R. Murray
GEORGE R. MURRAY
Callahan Building,
Dayton, Ohio.

Chas. W. Stiefel, Jr.
CHAS. W. STIEFEL, JR.
30 N. LaSalle St.
Chicago, Illinois.
Attorneys for Appellants.

STATEMENT OF APPELLANTS' POINTS ON APPEAL.

(Filed Sept. 3, 1943)

Now come the petitioners-appellants and state that they rely upon the following points in the prosecution of their appeal from the final orders and judgment entered on July 17, 1943 and the final order entered August 11, 1943:

1. The District Court erred in sustaining the motion filed February 5, 1943 by and on behalf of the Bondholders' Protective Committee to dismiss the petition.

2. The District Court erred in dismissing the petition and the proceedings for reorganization.

3. The District Court erred in failing to deny the petition of the Bondholders' Protective Committee to dismiss the petition.

4. The District Court erred in entering the order of August 11, 1943 dissolving the injunction entered January 12, 1943.

5. The District Court erred in dismissing the petition filed January 11, 1943 and the proceedings at the costs of James G. Gurney and his associates.

6. The District Court erred in not finding that the petition filed January 11, 1943 was properly filed under Chapter X of the Bankruptcy Act.

7. The District Court erred in not finding that the petition filed January 11, 1943 was filed in good faith.

8. The District Court erred in not approving the petition filed January 11, 1943 as having been filed in good faith.

WHEREFORE petitioners-appellants pray that the said final orders and judgments in this cause may be reversed and for such other and further relief as may be just in the premises.

George R. Murray
GEORGE R. MURRAY
Callahan Building,
Dayton, Ohio.

Chas W. Stiefel, Jr.
CHAS. W. STIEFEL, JR.
30 N. LaSalle St.
Chicago, Illinois.

Attorneys for Appellants.

DESIGNATION OF APPELLEES OF PORTIONS OF RECORD FOR RECORD ON APPEAL.

(Filed Sept. 14, 1943)

Now come the Appellees, Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, the Bondholders' Protective Committee for holders of bonds of The Western Tool & Manufacturing Company, and Owen N. Price, Trustee for bondholders of The Western Tool & Manufacturing Company, and object to and protest against the Designation filed in the name of The Western Tool & Manufacturing Company for the reason that said Company did not file or authorize the same, nor does James G. Gurney nor any other shareholder of said corporation, nor the attorneys for said James G. Gurney represent or are they authorized to appear for said Company; said Appellees likewise object to the mention in paragraph 1 of said Appellant's Designation of "Petition of Western Tool & Manufacturing Company for reorganization filed January 11, 1943" for the reason that no such Petition was filed by or for said The Western Tool & Manufacturing Company.

Said Appellees designate the following portions of the record, proceedings and evidence to be contained in the Record of Appeal:

1. Application of The Western Tool & Manufacturing Company filed herein February 5, 1943.
2. From Petitioner's Exhibit 1, (Petition for Foreclosure in Common Pleas Court):
   (a) Paragraph 3 (page 2) except the description of the property.
   (b) Paragraph 5(f).
   (c) Paragraph 5(h).
   (d) Paragraph 11.
   (e) Paragraph 14.
3. From Petitioner's Exhibit 4 (Judgment Entry in Foreclosure case in Common Pleas Court), all of page 1.

4. From Petitioner's Exhibit 18, (Bondholders' Protective Agreement):

   (a) The second paragraph beginning on page 3 (beginning "The depositors who unite", etc.) down to and including the word "Agreement" in line 6 of said paragraph.

   (b) The last sentence on page 5 (beginning with the words "Upon the deposit of any bonds", etc.).

September 13, 1943.

Keifer & Keifer
KEIFER & KEIFER
512 M & M Building,
Springfield, Ohio.
Attorneys for Appellees.

Receipt of copies of above designation is hereby acknowledged this 14th day of September, 1943.

CHAS. W. STIEFEL
GEO. R. MURRAY
Attorneys for Appellants.

CLERK'S CERTIFICATE.

I, Harry F. Rabe, Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designation of Portions of Record filed by Appellants and Designation of Portions of Record filed by Appellees in this Court in the cause entitled "In the Matter of The Western Tool & Manufacturing Company, No. 9061" as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of Dayton in said District this ..... day of October, A. D. 1943.

.....

HARRY F. RABE,
Clerk.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE WESTERN TOOL & MANUFACTURING COMPANY TO DISMISS APPEAL

(Filed November 3, 1943).

Now comes The Western Tool & Manufacturing Company and moves the Court dismiss the appeal in this proceeding for the following reasons:

1. There was no authority given by this Company to the attorneys for James G. Gurney or to any other person to give any notice of appeal of the proceeding sought to be appealed herein, nor have said attorneys now any authority to appear for said Company.

2. The parties attempting to appeal herein have no appealable interest in the proceedings sought to be appealed here.

This Motion is supported by affidavits attached hereto and filed herewith.

The Western Tool & Manufacturing Company,

By Enoch J. Price,
Its President

Erna H. Wheeler,
Its Secretary.

Wm. H. Griffith,
Springfield, Ohio.

State of Illinois, County of Cook, ss.

Enoch J. Price, being first duly sworn, says that he is the President of The Western Tool & Manufacturing Company, the corporation mentioned in the above proceeding, and is familiar with its business and affairs; and that no authority has been given by said Company, its Directors or officers to Charles W. Stiefel, Jr., or George

R. Murray to give any notice of appeal or perfect an appeal for it, or appear for said Company in the above entitled proceeding.

Enoch J. Price,

Sworn to and subscribed before me this 29th day of October, 1943.

Ruth C. Nettland,
Notary Public.

State of Ohio, County of Clark, ss.

Erna H. Wheeler, being first duly sworn, says that she is the Secretary, Treasurer, Manager and a Director of said The Western Tool & Manufacturing Company of Springfield, Ohio, a corporation, and she is familiar with its business and affairs; and that no authority has been given by said Company, its Directors or officers to Charles W. Stiefel, Jr., or George R. Murray to give any notice of appeal or perfect an appeal for it, or appear for said Company in the above entitled proceeding.

Erna H. Wheeler,

Sworn to and subscribed before me this 1st day of November, 1943.

Eva M. Hauck,
Notary Public.

MOTION OF OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS OF THE WESTERN TOOL & MANUFACTURING COMPANY AND BONDHOLDERS' PROTECTIVE COMMITTEE TO DISMISS APPEAL.

(Filed November 3, 1943.)

Now come Owen N. Price, Trustee for bondholders of The Western Tool & Manufacturing Company under a

Mortgage Deed of Trust executed by said Company of November 1, 1921, and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, the Bondholders' Protective Committee for the holders of bonds of The Western Tool & Manufacturing Company, named as Appellees in the above entitled proceedings and move the Court:

First, to dismiss the appeal in so far as it is attempted to be made in the name of The Western Tool & Manufacturing Company for the reason that there was no authority by said Company to attorneys for James G. Gurney or to any other person to give any notice of appeal of the proceeding sought to be appealed herein, nor have said attorneys now any authority to appear for said Company. (All of which appears by affidavits of the President and Secretary of said Company attached to the Motion of said Company to dismiss appeal herein.)

Second, to dismiss the appeal herein for the reason that, as appears from the certified record herein, the parties attempting to perfect an appeal herein have no appealable interest in the proceeding from which appeal is sought to be perfected.

Keifer & Keifer,
(512 M & M Building.)
(Springfield, Ohio),
Attorneys for said Moving Parties.

CAUSE ARGUED AND SUBMITTED

(February 7, 1944).

Before: Hicks, Allen and Hamilton, JJ.

This cause is argued by Charles W. Stiefel, Jr. for Appellant and by W. W. Keifer for Appellees and is submitted to the court.

JUDGMENT.

(Entered: April 21, 1944.)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court.

OPINION.

(Filed April 21, 1944.)

Before Hicks, Allen & Hamilton, Circuit Judges.

Hamilton, Circuit Judge. The Western Tool & Manufacturing Company is an Ohio corporation created in 1904 which since that time has been engaged in the business of manufacturing tools in its own equipped factory at Springfield, Ohio. The corporation has outstanding 1120½ shares of common capital stock, par value $100.00 per share.

In November 1921, the corporation borrowed $90,000.00 and to secure the payment thereof, executed a mortgage trust deed which covered all of its property then in existence or afterwards acquired, except cash, notes and accounts receivable and inventories.

On July 20, 1923, the owners of 602½ shares of the corporation's capital stock created a voting trust and appointed a committee consisting of Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price. The shares were deposited with a trustee in exchange for receipts.

Opinion.

The purpose of the trust was to refund the mortgage indebtedness of the corporation at a lower interest rate and on more favorable terms. The voting trust was to continue until the payment or extinguishment of the mortgage indebtedness or a refundment of it, unless it earlier appeared that neither of these objects could be accomplished.

On November 1, 1923, the owners of the corporation's mortgage bonds formed a committee composed of Charles S. Deneen, W. T. Kettering, Edward I. Bloom, E. J. Price and W. D. Hollister. Subsequently, Deneen died and was succeeded by Roy Massena. All bonds, except $300.00 in amount, were deposited with the depository of the bondholders' committee. The voting trust and bondholders' committee were extant at the time of the institution of this action. Under the corporate charter, the Board of Direcors was composed of seven members to be elected at an annual meeting of the stockholders on the fourth Tuesday of January in each year. At a meeting of the stockholders March 28, 1941, the Board of Directors was reduced to five members.

On July 9, 1942, Owen N. Price, trustee under the mortgage deed of trust, filed in the Court of Common Pleas of Clark County, Ohio, a petition to foreclose the lien of the bondholders and on July 15, 1942, the Ohio court appointed W. T. Kettering operating receiver of the corporation's property and since that date he has operated it as a going concern.

The corporation filed its answer to the foreclosure petition admitting its allegations and consenting to the appointment of the receiver. On December 8, 1942, a judgment was entered on the mortgage against the corporation in the sum of $134,698.21, which was the principal sum due on the bonds together with eight percent interest.

James G. Gurney, acting for himself and on behalf of other owners of stockholders' depository receipts of the corporation, attempted to intervene in the state court

action and in connection therewith moved that the judgment of the state court be set aside. This motion was pending at the time the present action was instituted and no sale of the corporation's property under the state judgment had taken place.

On January 11, 1943, this action was begun ostensibly with the Western Tool & Manufacturing Company, petitioner, seeking relief under Chapter X of the Bankruptcy Act (11 U. S. C. A., Sec. 526 et seq.).

The facts pertaining to the foreclosure action in the state court are fully detailed in the petition in which it is further alleged that the value of the corporation's assets is greatly in excess of its liabilities and that no adequate relief can be obtained under Chapter XI of the Bankruptcy Act. The petition was signed: "The Western Tool & Manufacturing Co. By James G. Gurney." Filed with the petition was affidavit of Gurney in which he stated that he was the owner of seven shares of the corporation's capital stock and was the agent and attorney in fact for Stella K. Gurney, the owner of 66 shares, James Gurney, Jr., owner of 59 shares and Harlan T. Hyde, owner of 443½ shares.

Affiant also stated that W. T. Kettering, W. D. Hollister and Enoch J. Price, for the past three years, had exercised exclusively all the powers and rights of the Bondholders' Protective Committee and that they had likewise exercised all the rights and privileges of the voting trust. He further stated that these same individuals dominated the Board of Directors of the corporation through their own position on the board and by controlling Erna H. Wheeler and William J. Grimm who were employee-directors.

Affiant further said that Enoch J. Price for the purpose of misleading Harlan T. Hyde, stated in a letter to Hyde that it would be unnecessary for him to attend a stockholders' meeting to be held March 28, 1941, because nothing of importance would be considered then and that, relying on this statement, Hyde did not attend.

At this stockholders' meeting the charter of the corporation was amended reducing the number of members of the Board of Directors from seven to five. Stella G. Gurney, another stockholder, was given no notice of the meeting.

Affiant further stated that the charter of the corporation could not be amended without the attendance in person, or by proxy, of the owners of 673½ shares of the capital stock and that at the meeting held on March 28, 1941, at which the charter was amended, only 648½ shares of stock was represented and at the meeting held March 27, 1942, only 658½ shares of the capital stock were represented, at which meeting a new Board of Directors, now serving, was elected.

Affiant stated that because of the absence of sufficient stock ownership at the stockholders' meeting the election of the directors was void and that the corporation had been without a de jure board since March 28, 1941. Affiant also stated that the trustees of the voting trust had at all times acted adversely to the interest of the equitable owners of the stock and in the interest of the bondholders to the detriment of the corporation.

Affiant further stated that prior to July 20, 1923, the bondholders' committee agreed with the stockholders to cause a refunding of all the corporation's outstanding bonds at an interest rate not exceeding 4%, but that notwithstanding this agreement the trustees of the mortgage recovered 8% interest on said bonds in the foreclosure decree. It is further stated in the affidavit that the interlocking directors, trustees of the voting trust and the bondholders' committee have prevented the corporation from acquiring new, modern and efficient manufacturing equipment and have refused to employ for the corporation capable managers and operators. It is also stated that the voting trust terminated before the institution of this action because of the failure of its purpose and that the depositing stockholders have tendered to the depository of the voting trustees their stock receipts and de-

manded a return of their stock certificates, all of which has been refused.

Affidavit states that the equitable owners of the corporation's stock demanded of the Board of Directors of the corporation that it institute the present action but that the board notified the stockholders that no such action would be instituted and that a sale of the corporate assets would be made under the foreclosure decree in the state court.

The trial court approved the petition as filed in good faith, enjoined the further prosecution of the foreclosure action in the state court and continued the cause for further hearing. Subsequently the bondholders' committee and the corporation by its president and secretary moved to dismiss the petition on the following grounds: (1) that the petition was filed without authority of the Board of Directors of the corporation and without the knowledge, assent or authority of any of its officers; (2) that because of the fact the bondholders were the only creditors of the corporation and that they were opposed to any plan of reorganization, it was impossible of accomplishment; (3) that the petition was not filed in good faith and that James G. Gurney owned only three shares of the capital stock of the corporation and was without authority or legal right to act for and on behalf of the corporation and that said Gurney filed said petition in his attempt to dictate the policy and management of said corporation for his own personal benefit, and to delay and defeat the corporation in its purpose to pay its bonded indebtedness.

The court heard evidence on the respective motions to dismiss. It made no finding of fact or conclusion of law, but stated, "Upon a consideration of the facts as disclosed by the record in the instant case, the court is of opinion that James G. Gurney and his associates do not bring themselves within the rule laid down in Hawes v. Oakland, 104 U. S. 450.

"Upon a consideration of the whole of the record, the briefs and arguments of counsel and applicable law, the

court is of the opinion and so finds that the motion hereinbefore referred to of the Bondholders' Protective Committee is well taken and it should be and is sustained." The court entered an order dismissing the proceedings from which order this appeal is prosecuted.

Rule 23(b) of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in substance that in an action brought to enforce a secondary right on the part of one or more shareholders in a corporation because the corporation refused to enforce the right which may be properly asserted by it, the complaint shall be verified by oath and state that plaintiff was a stockholder at the time of the transaction of which he complains or that the shares thereafter devolved on him by operation of law and that the action is not collusive for the purpose of conferring jurisdiction. The complaint shall also set forth with particularity the efforts made by plaintiff to secure from the managing directors or trustees or from the stockholders the action he desires and the reason for his failure to obtain such action or the lack of effort on his part to obtain such action.

The above rule supersedes the decisions of the federal courts on procedural requirements in derivative shareholders' actions. It may be that under the doctrine of Erie v. Tompkins, 304 U. S. 64, the provisions of the rule in question must yield to state law—Gallup v. Caldwell, 120 F. (2d) 90 (C. C. A. 3)—but as we view the allegations of the petition in connection with the supporting affidavit, there is a substantial compliance with the procedural requirements of the rule insofar as it is applicable and it becomes unnecessary to determine whether or not the local law of Ohio applies. In any event, there is no distinction between the federal and state law material to the decision here. Jensen v. Republic Steel Corporation, 32 Ohio Law Abstract 29. Rule 12(e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides that "a bill of particulars becomes a part of the pleading which it supplements."

Opinion.

Treating the affidavit of Gurney as a bill of particulars, it is clear that he was a shareholder of the corporation at the time of the transactions of which he complains and that the action in no sense could be collusive because he seeks on behalf of the corporation a remedy provided under the laws of the United States and enforceable only in its courts. There can be no doubt that any effort on Gurney's part to secure action by the corporation through its directors or stockholders' committee would have been futile. Under such circumstances, it is unnecessary for the stockholder complainant to set forth with particularity his efforts to secure from the managing directors such action as he desires and the reason for his failure to obtain it. The rule does not apply if from all the circumstances of the case, it is made to appear with reasonable certainty that the directors cannot or will not bring the action and that a demand on the stockholders would be futile. Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U. S. 435, 452; Ashwander v. Valley Authority, 297 U. S. 288, 318, 323.

A corporate reorganization proceeding under Chapter X of the Bankruptcy Act is instituted by the filing of a petition, the formal requisites of which, as well as other papers filed in the proceedings, are the same in general as similar papers in ordinary bankruptcy actions. General Orders 5, 52. A petition for the reorganization of a corporation eligible for reorganization under the Act may be filed by the corporation. Bankruptcy Act, Sec. 126 (11 U. S. C. A. 526).

There is no rule enunciated in the statute for intercorporate action authorizing the institution of the proceedings. Whether the equitable owners of the stock of a corporation may institute such proceedings depends upon the laws of the state creating the corporation. In re De Camp Glass Casket Company, 272 F. 558 (C. C. A. 6).

Usually directors are the primary source of authority in acting for a corporation in filing a proceeding in bank-

ruptcy reorganization. However, when the Board of Directors refuse to act and it is made to appear that the directors have an interest antagonistic to the corporation, the equitable owners of the stock of a corporation may file the petition under the act on behalf of their corporation. In such a case a bankruptcy court will look beyond the corporate body as a legal entity distinct from its members and disregarding the fiction, will recognize the fact that a corporation is in reality an association of individuals for the purpose of private gain and that though the members have not the legal title to the assets they are nonetheless beneficial owners.

Under the laws of Ohio, equitable owners of the stock of a corporation under proper circumstances have the power in the name of the corporation to take advantage of the bankruptcy reorganization statute. Henry v. Jeanes, et al., 47 O. S. 116; Goslin v. Cincinnati & M. Canal Company, 18 O. S. 169; Buckeye Garage Company v. Caldwell, 18 C. C. (N.S.) 429 (Ohio); Jensen v. Republic Steel Corporation, supra; Garage & Sales Co. v. Caldwell, 18 O. C. C. (N.S.) 429. Such a proceeding is the corporation's action, only set in motion, because the corporation was made helpless by the erring directors. Larwill v. Burke, 19 O. C. C. 449 (aff. in 66 O. S. 683).

It is an application of the rule that in legal effect a stockholder's suit is one by the corporation, conducted by the stockholder as its representative. In such a proceeding, the corporation is the real party in interest.

Traditionally, corporate reorganization may be effected by a readjustment of the company's securities. It was a common practice prior to the enactment of Section 77B or of Chapter X for a corporation which had issued bonds secured by a mortgage and where the corporation had become embarrassed and unable to pay the interest, to effect a recapitalization by voluntary agreement with the stockholders and bondholders under which the stock and bonds or the bonds only of the company were readjusted so as to enable the company to continue busi-

ness and avoid foreclosure of mortgages on corporate property, the stockholders sometimes taking new stock of less par value and the bondholders surrendering their bonds in exchange for new ones with readjusted interest rates and maturities and sometimes by refinancing through a new bond issue. Gilfillan v. Union Canal Company of Pennsylvania, 109 U. S. 401. Under such proceedings for voluntary recapitalization directors acted in such matters only with the consent of the stockholders. It was recognized that the stockholders or members of the corporation themselves had the exclusive power to take the necessary steps to bring about a recapitalization.

Chapter X of the Bankruptcy Act was designed to facilitate the recapitalization or reorganization of corporate businesses and for this purpose there was brought within the ambit of the bankruptcy court all of the instruments or methods theretofore used by corporations, creditors and stockholders in effecting recapitalizations or reorganizations. Corporations should not be deprived of the benefits of the Act because their directors are in no position to act freely to obtain them, or will not so act in behalf of the corporation, and to so decide would destroy one of the purposes of the Act.

Based on the concept that the primary interest of a stockholder in a corporation is its continuance as a going concern, there is a vast amount of legal literature as to the right of a shareholder to bring a derivative suit on behalf of his corporation but the rule of the right, so far as applicable here, may be stated in brief: (1) Courts will not, at the instance of a stockholder, interfere in the management of a corporation in any case so long as the acts complained of are within the power of the corporation and are the result of the fair and honest judgment of the corporation acting through its officers; (2) Where the acts of which the stockholder complains are within the power of the corporation, but are so injurious to the corporation and through it to at least a part of its stockholders that it is apparent that the cor-

poration has not exercised a fair and honest judgment in the matter, then the courts will interfere but only as a last resort, namely after the Board of Directors have been given a chance to rectify the wrongful acts if it is made to appear that because of conflicting loyalties or fraudulent conduct, the directors are incapable of acting with fair, open and unprejudiced minds. Hawes v. Oakland, supra; Jensen v. Republic Steel Corporation, supra.

We are not here dealing with the details of the corporate business, but with a corporate act which is confiscatory of the rights of its shareholders. Neither the Board of Directors nor a majority of the shareholders may depive a minority shareholder of his interest in the coporation if there is an equitable way open to protect that interest along with that of all the other shareholders.

If there is a valid remedy against the claim of the bondholders in the present case which the Board of Directors could have invoked, but which they failed to do and the foreclosure action will damage the interests of the stockholders, the refusal of the board to invoke the remedy would of itself constitute such gross neglect on their part as to require the court to permit their interested cestuis que trustent, the stockholders, to pursue the remedy on behalf of the corporation. Dodge v. Woolsey, 59 U. S. 331, 342; Farmers Loan & Trust Company v. Toledo A. A. & N. M. Ry. Co., 67 F. 49 (C. C. Ohio).

Under Chapter X, Section 137 of the Act (U. S. C. A., Title 11, Section 537) a stockholder is expressly given an absolute right to intervene and file an answer to a corporate reorganization petition where the debtor is not insolvent. This is an independent right of a party in interest. Bankruptcy is an equitable proceeding and bankruptcy courts administer the law according to the spirit of equity, so there can be no valid reason why a stockholder, where the necessary prerequisite facts appear, may not either sue or defend on behalf of the corporation in a reorganization proceeding either in his own name or in the name of the corporation. Ogden v.

Gilt Edge Mines Company, 225 F. 723 (C. C. A. 8); Zeitinger v. Hargadine-McKittrick Dry Goods Company, 244 F. 719 (C. C. A. 8); Whittiker v. Brietson Mfg. Co., 43 F. (2d) 485 (C. C. A. 8)); United States Lines v. United States Lines Company, 96 F. (2d) 148 (C. C. A. 2). Since the suit is in equity, an equitable owner of the shares of a corporation has the same rights as a stockholder with the legal title. Fletcher Cyclopedia, Corporations, Permanent Ed., Vol. 5, Sec. 2092, page 326 and Vol. 13, Sec. 5976, page 349; Application of Bacon, 287 N. Y. 1, 38 N. E. (2d) 105.

Prior to the passage of the Act providing for corporate reorganizations, neither proceedings under the prior Act nor receiverships in equity, furnished adequate relief for distressed corporate debtors, their creditors and their stockholders. Equity receiverships and foreclosures were inadequate because no method existed for continuing enterprises as going concerns. Usually the intangible assets of corporations were sacrificed in a sale of the tangible property in satisfaction of lien debts, because the property of the corporation as a going concern was sold at an inadequate price and was usually bought in by a committee of bondholders with the result that non-assenting bondholders received little and stockholders nothing at all.

The purposes of the legislation were (1) to avoid immediate liquidation of the property involved in the reorganization of a corporation with a view to rehabilitating rather than liquidating, (2) to afford a respite to corporations in financial difficulties so the owners and creditors might have time to recapitalize or refinance and to preserve for all parties concerned intangible values which are usually a part of the assets of all going businesses and inseparable from its tangibles and (3) to give the holders of bonds of the corporation an opportunity to have it reorganized in lieu of liquidation under foreclosure. Continental Bank v. Rock Island Railway, 294 U. S. 648; Securities Commission v. U. S. Realty Company, 310 U. S. 434.

Section 414 of the Act (U. S. C., Title 11, Sec. 541) provides in substance that upon the filing of a petition by a debtor, the judge shall enter an order approving the petition if satisfied it has been filed in good faith or dismiss if it not so satisfied.

Section 146 of the Act (U. S. C., Title 11, Sec. 546) provides in substance that without limiting the meaning of the term "good faith" a petition shall be deemed not to be filed in good faith if it is unreasonable to expect that a plan of reorganization can be effected or if a prior proceeding is pending in any court and it appears that the interest of creditors and stockholders would be best served in such prior proceeding.

The rule is well established that a petition for reorganization under Chapter X of the Bankruptcy Act should be dismissed as not filed in good faith within the meaning of Section 146, if there is no reasonable expectation that the company could reorganize as a going concern and the rule also is well established that the party filing the petition under Chapter X while a prior proceeding is pending in a state or federal court, has the burden of showing that the interest of creditors and stockholders would be best served by a reorganization in bankruptcy. Fidelity Assurance Ass'n. v. Sims, 318 U. S. 608; Marine Properties v. Trust Company, 317 U. S. 78.

There is no good faith in a petition filed by stockholders in the name of a debtor unless it is shown that under some reasonable plan of reorganization such stockholders would retain an interest because persons without a pecuniary interest have no judicial standing in any court. The existence or non-existence of good faith in filing a creditor's petition for corporate reorganizations must be determined by the trial court in its discretion upon the evidence. The question is one of fact. In re Mt. Forest Fur Farms of America, 103 F. (2d) 69 (C. C. A. 6). Since the trial court made no findings of fact and made no reference in its decision to the question of good faith, we do not pass upon that issue, although appellees

insist on it. We are of the opinion that under the facts the equitable owners of the stock of the debtor were authorized to institute these proceedings.

The cause is reversed and remanded for further proceedings in accordance with this opinion.

Hicks, dissenting. I find myself out of harmony with the decision. It is a well-settled principle of equity jurisprudence that a stockholder has a right in a plenary suit to seek redress for wrongs done to a corporation where the proper officers thereof refuse to do so, but no such case is presented. Here, a dissatisfied stockholder endeavors, in the name of the corporation, to reorganize it under Chapter X of the Bankruptcy Act. This I think he cannot do. I find nothing in Chapter X that gives jurisdiction to the bankruptcy court for such purpose. From my viewpoint the proceedings under Chapter X are not intended therefor. They are intended for corporation reorganization purposes only; and according to Article I, Sec. 101, the provisions of the Chapter apply exclusively to proceedings thereunder. Of course a corporation has the right to file a petition for reorganization puposes but I think that the term "corporation" used in Chapter X refers to a corporation in the ordinary sense. It means a corporation as defined in the Act itself. I think that to allow Gurney to use the name of the corporation for reorganization purposes would imply jurisdiction in the bankruptcy court nowhere granted. It would require that court, before it reached the reorganization feature, to settle and determine all the complaints which Gurney, purporting to represent a class, makes against the directors, etc. It is rather clear to me that in his affidavit, attached to the petition, he sets forth enough, which, if properly averred in a bill in equity, would constitute good pleading, but for some reason not altogether apparent, he did not pursue that remedy.

From my viewpoint the appeal should be dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Sixth Circuit

No. 9665

In the Matter of the Reorganization of THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Debtor.

JAMES G. GURNEY, Individually, etc.,

Petitioner-Appellant,

vs.

ROY MASSENA, et al.,

Respondents-Appellees.

PETITION FOR REHEARING

(Filed May 10, 1944)

The Appellees respectfully request a rehearing of this case and for ground therefor say:

It appears to Appellees that the majority of the Court have misapprehended some aspects of the situation.

The ground of the reversal would seem to be that a stockholder can file a petition for reorganization when the directors wrongfully fail to do the thing the stockholder seeks to have done. In such a case therefore it would necessarily have to appear in the record that there was some such misconduct or wrongdoing. We find nothing

in the Opinion to this effect but only statements to the effect that Gurney, the stockholder, *alleged* in his Petition or Affidavit things claimed to be wrongful.

In this connection we respectfully call attention to that part of the Opinion (p. 4) where it is said that the affiant (Gurney) stated that "the bondholders' committee had used money of the corporation for the purpose of acquiring certificates of deposit from bondholders and had treated these certificates of deposit as the property of the bondholders' committee and that in the foreclosure proceedings, such bonds were treated as wholly unpaid and were included in the judgment at their par value." This statement is wholly incorrect. The Petition (p. 2) sets forth the fact that the *Company* purchased the $16,600.00 of bonds and that thereby the same were canceled, which is the exact fact. In Gurney's Affidavit (R. 7) it is stated that the directors "utilized funds of the corporation to purchase and acquire Certificates of Deposit of first mortgage bonds of the face or par value of Sixteen Thousand Six Hundred ($16,600.00) Dollars" but it is not stated that they purchased them for the Committee and this evidently was not meant for Gurney testified (R. 32) that he knew the Company purchased bonds from the bondholders, that he knew they were being purchased and approved of it. This $16,600.00 of bonds purchased reduced the total issue of $90,000.00 to $73,400.00 outstanding as stated in the Petition. (R. 2). $89,700.00 of bonds were deposited with the Bondholders' Committee. (The remaining $300.00 of bonds seem to have disappeared for they were not heard from for many years and are deemed to have become barred by the statute of limitations. R. 58, 60). A directors' meeting of September 6, 1941, Gurney being present, authorized the purchase of certificates of deposit of bonds. (R. 49). Perhaps misapprehension of this fact

had considerable to do with causing a belief on the part of the directors. As a matter of fact we felt, as stated in our Brief, (p. 16) that this purchase of bonds *for the Company* was evidence of good faith and fair dealing on the part of the directors.

Confusion may have arisen from the averment (R. 2) as to $16,000.00 having been paid by the Company to the Bondholders' Committee on June 16, 1942, "to be applied upon the indebtedness evidenced by the bonds," which was an entirely different matter. There was of course nothing wrongful in thus making a partial payment on an overdue debt. Gurney in his Affidavit (R. 7-8) says the Committee had not accounted herefor, which is directly contradictory to the allegations in the Petition above referred to and to the fact.

Allow us to call attention to the statement in the Opinion (p. 3) that Erna H. Wheeler and William J. Grimm neither owned stock. We find nothing in the Gurney Petition or Affidavit to this effect, nor in the testimony. The fact is that at least Mrs. Wheeler owns stock in her own right purchased by her long ago. Again, it is said (p. 4) that the Board of Directors notified the stockholders that no action to reorganize would be instituted and that a sale of the corporate assets would be made under the foreclosure decree. We find no basis for this statement in the record, either in the testimony or averments of Gurney.

The Opinion recites a number of allegations of the Petition and of the Gurney Affidavit. It would seem that in order to justify allowing a stockholder to file a petition for the Company it should be made to appear as a *fact* (not merely a claim or charge) that there had been some misconduct on the part of the officers or directors of the Company. The Opinion does not refer to any of the evidence. The Court below evidently found that there was

of the majority of the Court that there had been some misconduct on the part

no proof of misconduct and we suggest that it should appear what misconduct, if any, the reviewing court finds in the Record.

We ask leave to call attention to matters referred to as alleged by Gurney in justification of filing the Petition and to the lack of evidence to support them:

1. Gurney's Petition says the value of the assets of the Company is greatly in excess of the indebtedness. (R. 3). It nowhere appears in the evidence that the assets are in excess of its liabilities. On the contrary it appears from the financial statements offered by Gurney (R. 84-6) that the assets are not worth the liabilities by $51,608.08; being that much short of anything for stockholders. This, we believe, was the only evidence on the subject. This failure to show the solvency of the Company is in effect a failure to show "that under some reasonable plan of reorganization such stockholders would retain an interest," as stated in the Opinion, p. 10.

2. Attention is called to the letter written to Harlan T. Hyde in which it was stated that it would be unnecessary for him to attend a stockholders' meeting. This letter (R. 73) was not from Enoch J. Price, as stated in the Opinion (p. 3) but from Mrs. Wheeler. It is alleged in the Affidavit (R. 6) that this was at the direction of Enoch J. Price, but that was denied and there was no evidence to prove it. It nowhere appears that this statement was the cause of any harm to stockholders or occasioned any wrongdoing. It was a careless statement of Mrs. Wheeler, entirely on her own initiative, but it was at a time when the Company was extremely hard up and her eagerness for economy suggested that the expense of Mr. Hyde coming from Florida was not worthwhile. It was probably occasioned by the knowledge that the expenditure would be of no value to the Company. Her zeal for economy

bore good fruit in the Company's years of depression and loss. Hyde was immediately notified of the action at the meeting (R. 74) and made no objection. Neither did Gurney, who subsequently attended at least one directors' meeting. (R. 48-9). Furthermore, if the two stockholders' meetings were invalid because stockholders failed to attend, that does not constitute misconduct on the part of the directors which would justify a stockholder acting for the corporation in beginning a proceeding to reorganize under Chapter X.

3. It certainly is not a justification of such unusual action by a stockholder to state that the directors at all times acted adversely to the interest of the equitable owners and in the interest of the bondholders, without some definite statement of such adverse action and proof thereof.

4. We have already commented upon the untrue statement that the directors had utilized funds to purchase bonds for the Bondholders' Committee and showed that the purchase was for the corporation in the interest of the stockholders and perhaps adverse to the interest of the bondholders.

5. The averment that there had been an agreement prior to July 20, 1923, to cause a refunding of the bonds at an interest rate not exceeding 4 per cent is not important since there is no testimony to support the statement, especially when it appears from the Gurney Petition (R. 2) that the Company paid interest at 8 per cent for a time and at 6½ per cent and 6 per cent for many years after July 20, 1923, all without objection, so far as appears in the Record; and this notwithstanding that Gurney was a director from 1929 up to the present. (R. 31).

Perhaps the statement in Mr. Enoch J. Price's letter to Judge Oxford of June 26, 1941, (R. 68) referring to "the

plan of the Committee to reduce the unpaid interest rate to four per cent" may be considered to support the Gurney claim of reduction of interest rate, but that statement only relates to a "plan" which evidently was not carried out and not authorized by the bondholders. Likewise the testimony of Gurney (R. 31) that Mr. Price admitted that it had been agreed by the Committee that the rate of interest be reduced was nothing more than that at one time the Committee had been willing on certain terms to reduce the rate, which of course was not consummated and not authorized.

Conceding for the moment that there was a real dispute about the rate of interest, the bondholders must be recognized at least as acting in good faith, until the contrary is shown. The time for contesting the amount due on the bonds was past before the Gurney Petition was filed.

6. What is the importance of the allegation in Mr. Gurney's Affidavit that the directors did not acquire what he considered new, modern and efficient equipment and refused to employ managers and operators that he suggested? Those were matters of business judgment entrusted to the directors and whether they exercised the best possible judgment looking at it from the present is not important. But the present success of the Company is some evidence that their judgment and policy were not wholly at fault.

We find no other mention or reference in the Opinion to misconduct or allegations of misconduct.

Looking now at the proof offered we call attention to the fact that Gurney wholly failed to substantiate any evidence of misconduct.

Gurney had every opportunity to raise any question or make any defense that he believed should be made in the foreclosure case. He had notice of that proceeding

from July 10, 1942, (the day after the suit was filed), (R. 21), and of all action taken or contemplated therein up to December 8, 1942, when the decree was rendered, and made no attempt to intervene or raise any question therein. It is inconceivable that the State Court would not have given him every opportunity to contest any matter that appeared at all debatable. No excuse is suggested for this neglect.

As to the specific things suggested as wrongful:

The bringing of the foreclosure is spoken of as such. It was brought by the Trustee for the bondholders pursuant to his duty. No reason is proved or suggested that there was not a perfect right to foreclose for the long past due defaults.

Did the directors have a *legal duty* to file a petition under Chapter X, when there was only one creditor and that one opposed to reorganization? Was not the matter of attempting a reorganization a matter wholly of discretion and business judgment depending upon business conditions, prospects in the industry, etc.?

The burden of course was upon the petitioner to show ground to entitle him to intervene and act for the Company and no such showing was made.

The Opinion seems to assume that this record shows some ground to justify the stockholder's action but nothing is said on this subject except to quote from Gurney's Petition and Affidavit. Surely it is not sufficient to rely on claims or averments of a party upon whom the burden of proof rests. The law laid down in *Hawes* v. *Oakland*, 104 U. S. 450, was in part carried into Equity Rule 27 and Rule 23(b) of Rules of Civil Procedure, but we respectfully suggest that these rules did not supersede the pronouncement of the Supreme Court in *Hawes* v. *Oakland* as to what must be shown to entitle the stockholder to pro-

ceed. (See Syl. 1 and pp. 456-7, 460-1). These things, or some of them, "must *exist* as the foundation of the suit."

It seems conclusive to us that the record shows that reorganization is impossible because of the opposition of all the creditors. The burden was on Gurney, as the Opinion expressly declares, to show "reasonable prospect," but no attempt to show such reasonable prospect was made. In fact, it is clear that there is no prospect. All creditors are represented in the present proceeding and they appear in opposition. It was up to Gurney to show, if he could, that they were not fairly represented. According to the Witherbee case, (88 Fed. 2nd 251), the Committee is entitled to represent the deposited bonds until a bondholder withdraws with the consent of the court.

In this situation the question arises as to why send the case back to the District Court to hear and pass upon a question that is clearly settled by this record. Some showing should have been made to justify the expense, delay, and resulting loss to the interested parties.

It is said that the District Court did not pass upon the good faith of the Petition. If this is true it would not justify a remanding for the Record shows that there was not, within the meaning of the statute, good faith.

The remanding to the District Court merely invites delay, expense, and a frittering away of the assets of this concern to the great loss to the parties really interested, the bondholders, who loaned their money to this corporation more than twenty-two years ago and ever since have upheld the concern and given it and the stockholders every chance to recuperate and put it on its feet.

Respectfully submitted,

KEIFER & KEIFER,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

It is hereby certified that the Appellees' Petition for Rehearing is filed in good faith for the purpose of obtaining a rehearing of this case, is not for delay and, in the opinion of counsel, states a meritorious case for such rehearing.

WM. W. KEIFER,
of Counsel for Appellees.

(Signed Certificate is filed with the printed copies of the Petition for Rehearing.)

ORDER ON PETITION FOR REHEARING

(Entered June 1, 1944.)

The opinion rendered in this cause on April 21, 1944, is amended by striking from the third full paragraph, last line, page 3, the following: "neither owing mortgage bonds nor corporate stock," so that the sentence ends with the word "directors" and also by striking from the first full paragraph, line 8, page 4, the following: "and that the bondholdes' committee had used money of the corporation for the purpose of acquiring certificates of deposit from bondholders and had treated these certificates of deposit as the property of the bondholders' committee and that in the foreclosure proceedings such bonds were treated as wholly unpaid and were included in the judgment at their par value," so that the sentence ends with the word "corporation."

Appellee's petition for rehearing is denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of James G. Gurney, Individually etc. vs Roy Massena, et al. No. 9665, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 29th day of July, A. D. 1944.

J. W. Menzies,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5542)